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Attorneys' Fees

ATTORNEYS' FEES—COMMENT—ATTORNEYS' FEES UNDER FEDERAL CIVIL RIGHTS LEGISLATION.

I. INTRODUCTION

Knowledge of the law concerning attorneys' fees is crucial to many litigators. Since this area of the law is currently in the process of formulation, this comment will survey the recent decisional guidelines concerning attorneys' fees promulgated by the United States Court of Appeals for the Third Circuit. The comment will then focus upon the Third Circuit's most recent pronouncements regarding attorneys' fee awards in connection with civil rights litigation, the area in which this topic has been most fully developed.

Under the traditional American rule, courts are not permitted to assess attorneys' fees against a losing litigant;¹ each party to the lawsuit bears the cost of its own counsel.² Attorneys' fees are thus not recoverable under this rule in the absence of a statute or enforceable contract providing therefor.³

Objecting to this allegedly inequitable result,⁴ many commentators have repeatedly advocated adoption of the English rule,⁵ which awards fees to the

1. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). The "American rule" differs from the "English rule," which awards attorneys' fees as a matter of course to the prevailing party. See generally Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

2. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). See also Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 281 (1977); Hermann & Hoffmann, *Financing Public Interest Litigation in State Court: A Proposal for Legislative Action*, 63 CORNELL L. REV. 173, 175 (1978).

3. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). The United States Supreme Court first announced the rule in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), and adhered to it in later decisions. See, e.g., *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Stewart v. Sonneborn*, 98 U.S. 187 (1879); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

The practice of only allowing fees in equity or pursuant to statute was derived from England. Prior to the American Revolution, English chancery courts allowed, in the discretion of the Chancellor, the awarding of attorney fees to the prevailing party. D. DOBBS, *LAW OF REMEDIES* § 3.8, at 197 (1973), citing Goodhart, *supra* note 1. While equitable and discretionary considerations governed in the courts of equity, such awards were available in the courts of law only when authorized by statute. D. DOBBS, *supra*, § 3.8, at 198. "Thus, there was drawn a distinction between cases in equity and cases at law with respect to attorney fee awards." Walker, *Recovery of Attorney Fees in Civil Rights Litigation*, 39 ALA. LAW. 93, 93 (1978). The ancient English legal-equitable dichotomy was absorbed into American law without any general corresponding statute permitting costs at law, and has been the prevailing rule with regard to the allowance of attorney fees. *Id.* See generally Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

4. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 84 (1963); Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 321 (1977). These commentators generally stress the evils of the current rule, including the fact that under it the successful party is never fully compensated because such party must pay counsel fees which may be equal to or greater than the total recovery in the suit. *Id.*

5. See, e.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Kuenzel, *supra* note 4; McCormick, *Counsel Fees and Other Expenses of*

prevailing party.⁶ Conversely, those who prefer the American rule generally maintain that: 1) being forced to pay an opponent's counsel fees is a form of penalty and that a litigant should not be penalized for defending or bringing a lawsuit;⁷ 2) the poor might be reluctant to initiate lawsuits to vindicate their rights if faced with the prospect of paying their opponent's counsel fees;⁸ and 3) determining the amount of reasonable attorneys' fees would be too great a burden on the judiciary.⁹ Perhaps due to this rationale, American courts adhere to the American rule¹⁰ and decline to award attorney fees on a routine basis. There are, however, a number of statutory and common law exceptions.

II. EXCEPTIONS TO THE AMERICAN RULE

A. Common Law

1. Exceptions

Courts have used their equity powers to fashion three major exceptions to the American rule: 1) the common fund-substantial benefit exception; 2) the bad faith exception; and 3) the private attorney general exception.¹¹

Litigation as an Element of Damages, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Comment, *Court Awarded Attorneys' Fees and Equal Access to the Court*, 122 U. PA. L. REV. 636, 648-55 (1974); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967). See generally Note, *supra* note 4, at 320. See also Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 437-38 (1973).

In spite of this extensive criticism, the American rule has recently been upheld by the United States Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

6. As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs. See Statute of Glouster, 1278, 6 Edw. 1, c. 1. The Statute of Glouster, which expressly mentioned only "the costs of his writ purchased," was from the outset liberally construed to encompass all legal costs of suit, including counsel fees. Goodhart, *supra* note 1, at 852. Since 1606, English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. See Statute of Westminster, 1606, 4 Jac. 1, c. 3. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special "taxing masters" in order to determine the appropriateness and size of counsel fee awards. Goodhart, *supra* note 1, at 854-55. See generally C. MCCORMICK, *LAW OF DAMAGES* § 60, at 234-36 (1935); Goodhart, *supra* note 1, at 849-72. To prevent an undue burden on these masters, fees which may be included in an award are usually statutorily prescribed in detail—even the amounts that may be recovered for letters drafted on behalf of a client are set forth. *Id.* at 856-57.

7. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); Sands, *Attorney's Fees as Recoverable Costs*, 63 A.B.A.J. 510, 513 (1977).

8. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

9. *Id.*

10. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

11. Walker, *supra* note 3, at 93-94. The common fund exception first arose in *Trustees v. Greenough*, 105 U.S. 527 (1882). In *Greenough*, a bondholder obtained a judgment that preserved a fund in which he shared a common interest with other bondholders. *Id.* at 529. The bondholders then earned a considerable amount of money from management of the fund by court appointed agents. *Id.* The Court, pursuant to its equity power, awarded attorneys' fees

The common fund exception applies when a party, at his own expense, brings an action and creates or preserves a fund in which others share.¹² If no fund has been created, the exception may still apply if the litigation has conferred a substantial benefit on an identifiable class.¹³ Courts, through their equity power, may award attorneys' fees out of the fund or require contribution by those on whom the benefit has been conferred.¹⁴ The bad faith exception allows a court to exercise its equity powers by awarding attorneys' fees to a party when his opponent has acted in bad faith, in a vexatious or wanton manner, or for oppressive reasons.¹⁵ Finally, the private attorney general exception, now discredited,¹⁶ combines the principles of the common fund and bad faith exceptions by extending the award of attor-

out of the fund in order to avoid undue hardship to the plaintiff and an unfair advantage to the other bondholders. *Id.* at 532.

The Supreme Court significantly expanded the common fund exception in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). In *Sprague*, a depositor, by obtaining a judgment against an insolvent bank, established claims of other depositors against the bank. *Id.* at 162-63. The Court approved a fee award to the plaintiff even though the judgment did not create a fund for the other depositors. *Id.* at 167.

Greenough and *Sprague* established the foundation for a "private attorney general" exception. *Ojeda v. Hackney*, 452 F.2d 947, 948 (5th Cir. 1972); *Gibbs v. Blackwelder*, 346 F.2d 943, 945 & n.1 (4th Cir. 1965). As stated by some commentators, the primary goal underlying common fund fee awards was "to avoid the unfairness inherent in forcing a plaintiff who bestows benefits on many to bear alone the expenses of litigation." Hermann & Hoffmann, *supra* note 2, at 177, citing *Trustees v. Greenough*, 105 U.S. at 532. See also Note, *Awarding Attorney's Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 736, 739-40 (1973).

Opining that the same policy considerations apply where the benefits of litigation are not in the form of a fund against which fees can be assessed, lower federal courts extended the original common fund doctrine to such situations. See *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 21-22 (N.D. Cal. 1973), *opinion supplemented*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). These courts took the position that private attorney generals, if given an incentive to sue, could protect important national interests not limited to a clearly definable class. See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 145 (5th Cir. 1971); *LaRaza Unida v. Volpe*, 57 F.R.D. 94, 99 (N.D. Cal. 1972), *aff'd on other grounds*, 440 F. Supp. 904 (N.D. Cal. 1977).

It should be noted at this point that the lower courts' attempted expansion of the "private attorney general" doctrine was abrogated by the United States Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). See text accompanying notes 23-25 *infra*. For example, in both *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973), *opinion supplemented*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), and *LaRaza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd on other grounds*, 440 F. Supp. 904 (N.D. Cal. 1977), the reviewing court held that the trial court had erred in light of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), but affirmed on the grounds of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976). 550 F.2d at 465-66; 440 F. Supp. at 910, 913. The "private attorney general" doctrine was thus replaced by the awarding of statutory fees. See text accompanying notes 70-74 *infra*.

12. Note, *supra* note 4, at 322.

13. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-97 (1970); Note, *supra* note 4, at 322.

14. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-97 (1970); *Trustees v. Greenough*, 105 U.S. 527, 536 (1881).

15. *Hall v. Cole*, 412 U.S. 1, 5 (1973). For a comprehensive discussion of the federal bad faith exception, see Note, *supra* note 4.

16. See text accompanying note 24 *infra*.

neys' fees to public interest litigation.¹⁷ Its purpose was "to encourage litigation aimed at vindicating strong national policies."¹⁸

The origin of the private attorney general exception has been traced to *Mills v. Electric Auto-Lite Co.*,¹⁹ in which the United States Supreme Court extended the common fund exception to a nonpecuniary action contesting proxy solicitation in a corporate merger.²⁰ The *Mills* Court held that prevailing plaintiffs may recover attorneys' fees under the common fund exception in cases in which the action benefits the members of an identifiable class and the awarding of fees will spread the litigation costs among the members of that class.²¹ *Mills* seemed to completely endorse a "private attorney general" exception since the Court applied the common fund exception to a situation where suit was brought under a statute that did not specifically authorize attorneys' fees.²²

In *Alyeska Pipeline Service Co. v. Wilderness Society*,²³ however, the Supreme Court abrogated the private attorney general concept²⁴ and held

17. Note, *Attorney's Fees—Recovery by Prevailing Defendants in Title VII Actions*, 13 WAKE FOREST L. REV. 627, 630 (1977). See note 11 *supra*.

18. Note, *supra* note 17, at 630 n.24, quoting Note, *supra* note 11, at 733. For an in depth discussion of the development of the "private attorney general" principle, see Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); Comment, *supra* note 5, at 655-81; Note, *supra* note 11, at 733.

19. 396 U.S. 375 (1970).

20. *Id.* at 396-97. The Court authorized the award of attorneys' fees to plaintiffs who had brought an action under federal securities law to prevent use of misleading proxy statements. *Id.* at 389-97. The judgment did not create a monetary fund for either the plaintiff or the other shareholders. *Id.* at 392.

21. *Id.* at 392-93. For a general discussion of *Mills*, see Hermann & Hoffmann, *supra* note 2, at 178-79.

22. Hermann & Hoffmann, *supra* note 2, at 179. The language used by the *Mills* Court seemed to expand the common fund theory into a "common benefit" exception. See Dawson, *supra* note 18, at 896-97. Professor Dawson suggests that *Mills* is more in the nature of "private attorney general" litigation, although couched as a common benefit case. *Id.* at 895. Other commentators, however, maintain that common benefit principles do not adequately explain the policy justifications behind "private attorney general" actions—to encourage private enforcement actions that raise issues of public policy and to provide sufficient compensation to attract competent counsel. Hermann & Hoffmann, *supra* note 2, at 180 n.34. Though Hermann & Hoffmann suggest that a theoretical common benefit to the public always results from this enforcement process, they contend that the common benefit analysis in *Mills* creates too restrictive a test on which to base financing of public interest litigation. *Id.*

23. 421 U.S. 240 (1975).

24. *Id.* at 247-71. A citizens' environmental group sought to prevent the government from issuing permits for the trans-Alaska pipeline. *Id.* at 241. The plaintiffs prevailed in the court of appeals, but the litigation was subsequently terminated by federal legislation allowing the issuance of such permits to a pipeline corporation. *Id.* at 244-45. The court of appeals nevertheless held that the allowance of attorneys' fees to the prevailing plaintiffs was appropriate since the plaintiffs were acting as "private attorneys general" in attempting to vindicate important statutory rights of all citizens. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974). The court stated:

In sum, the equities of this particular case support an award of attorneys' fees to the successful plaintiffs-appellants. Acting as private attorneys general, not only have they ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interest.

Id.

The Supreme Court, however, reversed in a 5-2 decision, holding judicial reallocation of the burdens of litigation without legislative guidance to be improper. 421 U.S. at 247. The

that absent an authorizing statute, federal courts' power to award fees is limited to cases of bad faith or of benefit to a limited class of special beneficiaries against whom the award is taxed.²⁵ Today, therefore, only the bad faith and common fund exceptions are still viable.²⁶

2. Basis of a Court's Power to Make a Fee Award—Equity

The Supreme Court's decision in *Alyeska* clearly indicated that a federal court must derive its authority to award fees from two distinct sources:²⁷ 1) its historic equity power;²⁸ or 2) a statute authorizing a fee award.²⁹ The propriety of a fee application thus turns on the basis for or the nature of the court's power to award fees. *Alyeska* reaffirmed the equitable common fund and bad faith rationales for an award of attorneys' fees.³⁰

The bad faith exception is derived from the historic equity jurisdiction of the federal courts.³¹ Attorneys' fee awards have been upheld by the Supreme Court against a party that deliberately disobeyed a court order,³² and against a recalcitrant employee whose default with respect to his employer's claim was "willful and persistent."³³ In *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*,³⁴ the Supreme Court defined the bad faith exception: "We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." ³⁵

Court noted that common law limited the award of attorney fees to statutorily prescribed cases. *Id.* at 247-49. Those cases arising under the equity jurisdiction of the federal courts were also distinguished. *Id.* at 257-59. The *Alyeska* Court reasoned that even though traditional equitable exceptions were products of the courts' inherent power, it is Congress' prerogative to determine whether the protection of federal rights under a specific statute warrants the award of attorneys' fees. *Id.* at 263-64, 269. The Court's decision, based on the long history of congressional control over the award of attorneys' fees, posited that Congress has accepted the American rule, and has made exceptions only under certain statutes that protect federal rights. *Id.* at 247-62, 269. The Court also noted that although Congress has not done so, it has the power to forbid the award of attorneys' fees under the bad faith and common fund exceptions. *Id.* at 259-60.

For a general discussion of *Alyeska's* impact on public interest practice, see Hermann & Hoffmann, *supra* note 2, at 185-86.

25. See 421 U.S. 257-59; Hermann & Hoffmann, *supra* note 2, at 185, quoting *Commission on Civil Rights v. Romney*, 518 F.2d 71, 72 (1st Cir. 1975).

26. See Walker, *supra* note 3, at 94-95.

27. 421 U.S. at 260. See text accompanying notes 24 & 25 *supra*.

28. For a discussion of the courts' common law and equitable power to award fees, see notes 30-47 and accompanying text *infra*.

29. For a discussion of the courts' statutory power to award fees, see notes 48-113 and accompanying text *infra*.

30. See text accompanying note 25 *supra*.

31. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 (1939).

32. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

33. *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962).

34. 417 U.S. 116 (1974).

35. *Id.* at 129. The exception has received subsequent reindorsement by the circuit and district courts. See, e.g., *Haythe v. Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972); *Horton v. Lawrence County Bd. of Educ.*, 449 F.2d 793 (5th Cir. 1971); *Seaman v. Spring Lake Park Independent School Dist.*, 387 F. Supp. 1168 (D. Minn. 1974); *Gilpin v. Kansas State High School Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1974) (supplemental memorandum order).

The authority for an award of fees under the equitable common fund doctrine originated in *Trustees v. Greenough*.³⁶ In *Greenough*, the Supreme Court applied the traditional equitable principle of unjust enrichment, postulating that enrichment through another's loss is unjust and should be restored.³⁷ In *Sprague v. Ticonic National Bank*,³⁸ the Supreme Court posited that these equitable powers may be used to compensate individuals whose actions in commencing, pursuing, or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation.³⁹ One equitable action for an award of fees was vested in the plaintiff who brought suit and performed a service benefiting other class members.⁴⁰ A second equitable action for an award of attorneys' fees belonged to the attorney since he had conferred a benefit upon the class members, and the remaining class members should therefore pay the amount which the court determined to be the reasonable value of the services benefiting them.⁴¹ This principle was enunciated by the Supreme Court in *Central Railroad & Banking Co. v. Pettus*.⁴² An attorney thus has standing to assert the client's claim for fee reimbursement against the fund⁴³ and is himself entitled to "reasonable compensation for [his or her] professional services."⁴⁴

One commentator has analyzed the propriety of the common fund doctrine as follows:

The rationale underlying the common fund doctrine supports the plaintiff's recovery of all but his or her share of the actual costs incurred in conferring the benefit upon others, and supports recovery by the attorney of the market value of his or her time and effort, to the extent not so compensated by the client.⁴⁵

The discretion of the court in determining the proper amount of a fee award is therefore limited.⁴⁶ The equitable cases discussed have indicated that courts must exercise their power to prevent unjust enrichment both by benefited class members and by recipients of fee awards.⁴⁷

B. Statutory Exceptions

To date, at least seventy-five federal statutes confer a right to recover attorneys' fees.⁴⁸ Congress has provided a statutory basis for an award of

36. 105 U.S. 527 (1882). See note 11 *supra*.

37. 105 U.S. at 532.

38. 307 U.S. 161 (1939).

39. *Id.* at 167.

40. *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 127 (1885). 113 U.S. at 127.

41. *Id.* at 125.

42. 113 U.S. 116, 127 (1885). See text accompanying notes 40 & 41 *supra*.

43. *Berger*, *supra* note 2, at 300 (footnote omitted).

44. *Id.* For an in depth analysis, see *id.* at 298-300. See also Dawson, *supra* note 18, at 851.

45. *Berger*, *supra* note 2, at 300.

46. See *Tranberg v. Tranberg*, 456 F.2d 173, 175 (3d Cir. 1972).

47. See notes 36-46 and accompanying text *supra*.

48. For a compilation of the seventy-five federal statutes that either authorize or mandate a court to award attorneys' fees as part of the relief granted, see *Berger*, *supra* note 2, at 303 n.104.

attorneys' fees in virtually every type of civil rights action.⁴⁹ The most important and most frequently litigated statutes authorizing fee awards with respect to civil rights litigation⁵⁰ are the Civil Rights Attorneys' Fees Awards Act of 1976 (Awards Act),⁵¹ Title VII of the Civil Rights Act of 1964 (Title VII),⁵² and Title II of the Civil Rights Act of 1964 (Title II).⁵³

1. *The Awards Act*

The Awards Act provides for awards of attorneys' fees in suits predicated upon sections 1981, 1982, 1983, 1985, or 1986⁵⁴ as well as Title VI of the Civil Rights Act of 1964⁵⁵ and Title IX of the Education Amendments of 1972.⁵⁶

Section 1981 is used most commonly to challenge employment discrimination based on race, color,⁵⁷ and exclusionary admissions policies at recreational facilities.⁵⁸ Section 1982 is utilized to attack discrimination in property transactions, such as the purchase of a home.⁵⁹ Section 1983 is utilized to challenge policies, programs and practices under color of state law that violate the Constitution of the United States.⁶⁰ Litigation under this section has resulted in successful challenges to unconstitutional practices of school boards,⁶¹ state mental hospitals,⁶² and local police.⁶³ Sections 1985 and 1986 are used to challenge public or private conspiracies that deprive individuals of the equal protection of the laws.⁶⁴ Title VI of the 1964 Civil Rights Act prohibits the use of federal funds in a discriminatory manner and requires recipients to administer those funds without regard to race, color,

49. Walker, *supra* note 3, at 97.

50. *Id.* at 100.

51. 42 U.S.C. § 1988 (1976).

52. *Id.* § 2000e-5(k).

53. *Id.* § 2000a-3(b).

54. *See id.* § 1988; *see also id.* §§ 1981, 1982, 1983, 1985, 1986.

55. *See id.* § 1988; *id.* §§ 2000d-2000d-6. *See also* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE JUDICIARY COMM., 94th Cong., 2d Sess., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976—SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 212-13 (1976) [hereinafter cited as SOURCE BOOK].

56. *See* 42 U.S.C. § 1988 (1976); 20 U.S.C. §§ 1681-1686 (1976). *See also* SOURCE BOOK, *supra* note 55, at 212-13.

57. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). *See also* SOURCE BOOK, *supra* note 55, at 212.

58. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). *See also* SOURCE BOOK, *supra* note 55, at 212.

59. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See also* SOURCE BOOK, *supra* note 55, at 212.

60. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* SOURCE BOOK, *supra* note 55, at 212.

61. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); SOURCE BOOK, *supra* note 55, at 212-13.

62. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975). *See also* SOURCE BOOK, *supra* note 55, at 213.

63. *See* Monroe v. Pape, 365 U.S. 167 (1961). *See also* SOURCE BOOK, *supra* note 55, at 213.

64. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971). *See also* SOURCE BOOK, *supra* note 55, at 213.

or national origin.⁶⁵ Finally, Title IX forbids discrimination on account of sex, blindness, or visual impairment in certain federally assisted programs and activities relating to education.⁶⁶

The Awards Act does not apply to cases arising under Title II or Title VII since those statutes contain attorneys' fees provisions.⁶⁷ Congress, however, followed the language of the Title II and Title VII provisions for reasonable counsel fees to prevailing parties in enacting the Awards Act.⁶⁸ The Awards Act "simply applies the type of 'fee-shifting' provision already contained in Titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards."⁶⁹

The Awards Act, passed in reaction to the *Alyeska* decision,⁷⁰ was designed to remedy the anomaly in the civil rights laws whereby awards of fees were available in some civil rights cases and unavailable in others.⁷¹ During the congressional hearings, it was stated that the "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."⁷² Congress thus determined that if private citizens are to be able to assert their civil rights, they must have the opportunity to recover their costs incurred in vindicating these rights in court.⁷³ To effectuate this goal, Congress enacted the Awards Act, which amended section 1988 and provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX . . . , or in any civil action . . . charging a violation of . . . title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing party*, other than the United States, a *reasonable* attorney's fee as part of the costs.⁷⁴

65. *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Lau v. Nichols*, 414 U.S. 563 (1974).

66. SOURCE BOOK, *supra* note 55, at 213.

67. See text accompanying notes 81 & 84 *infra*.

68. SOURCE BOOK, *supra* note 55, at 8-9.

69. *Id.* at 3 (remarks of Sen. Tunney).

70. See notes 23-25 and accompanying text *supra*.

71. REPORT OF THE SENATE JUDICIARY COMMITTEE, S. REP. NO. 94-1011, 94th Cong., 2d Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908 [hereinafter cited as S. REP.]. See text accompanying notes 68 & 69 *supra*.

72. S. REP. at 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910. *Accord*, H. REP. NO. 94-1558, 94th Cong., 2d Sess. 1 (1976).

73. S. REP. at 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910. The Act does not reverse *Alyeska* directly, as it does not provide for fees in the environmental statutes underlying the *Alyeska* suits, but deals only with *Alyeska's* effect upon civil rights litigation. Note, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 206 nn. 1-7 (1977). The Civil Rights Act of 1866, codified at 42 U.S.C. §§ 1981, 1982, 1987, and 1988 (1976), and The Civil Rights Act of 1871, codified at 42 U.S.C. §§ 1983, 1985, and 1986 (1976), were enacted to provide a federal remedy for the deprivation of federally protected rights. Walker, *supra* note 3, at 97 & n.30.

74. 42 U.S.C. § 1988 (1976) (emphasis added) (citations omitted). Attorney fees are awardable to the prevailing party by virtue of the enactment. *Id.*

2. Title VII of the Civil Rights Act of 1964

Title VII⁷⁵ was enacted to ensure equal employment opportunity regardless of race, color, sex, religion, or national origin.⁷⁶ The law prohibits employers from failing or refusing to hire, discharging, discriminating, limiting, segregating, or classifying applicants for employment in a detrimental way on any of these bases.⁷⁷ Suits under Title VII include allegations of sex discrimination,⁷⁸ race discrimination,⁷⁹ and discrimination due to national origin.⁸⁰

Title VII contains its own attorney fee provision:

In any action or proceeding under this subchapter the court, in its discretion, may allow the *prevailing party*, other than the Commission or the United States, a *reasonable* attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.⁸¹

3. Title II of the Civil Rights Act of 1964

Title II⁸² is aimed at eliminating discrimination based on state laws classifying persons on the grounds of race, color, religion, or national origin in places of public accommodation.⁸³ The Title II fee award provision provides in part: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the *prevailing party*, other than the United States, a *reasonable* attorney's fee" ⁸⁴

This statute was given a very liberal construction by the Supreme Court in *Newman v. Piggie Park Enterprises*.⁸⁵ The *Newman* Court enunciated a policy of "ordinarily" permitting fee awards to anyone who has succeeded in obtaining an injunction in a Title II suit,⁸⁶ and held that a prevailing plaintiff under Title II should be awarded attorneys' fees "unless special circumstances would render such an award unjust."⁸⁷

This liberal view is limited in scope since the *Newman* Court based its holding on the specific circumstances extant in a Title II case. The Court stated that a successful Title II plaintiff obtains an injunction "not for himself

75. The fee awards provision is codified at 42 U.S.C. § 2000e-5(k) (1976).

76. *Id.* § 2000e-2(a).

77. See Walker, *supra* note 3, at 99 n.45. Title VII also applies to employment agencies and labor unions. *Id.*

78. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

79. See Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

80. See Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

81. 42 U.S.C. § 2000e-5(k) (1976) (emphasis added).

82. *Id.* § 2000a-1.

83. *Id.*

84. *Id.* § 2000a-3(b) (emphasis added).

85. 390 U.S. 400 (1968) (per curiam).

86. *Id.* at 402.

87. *Id.* No such circumstances existed in *Newman* and the Court awarded "reasonable counsel fees as part of the costs to be assessed against the respondents." *Id.* at 403.

alone but also . . . vindicat[es] a policy that Congress considered of the highest priority.”⁸⁸ The Court, however, noted that damages cannot be recovered under Title II,⁸⁹ and thus that few aggrieved parties would be in a position to advance the public interest by bringing a Title II action.⁹⁰ The Court determined that it was this fact which motivated Congress to enact the counsel fee provision of Title II.⁹¹ In further support of this justification for fees, the Court stated that the “bad faith” exception⁹² would make the fee provision unnecessary if that provision were simply designed to punish litigants who deliberately advanced untenable arguments.⁹³

4. *The Standards for Awarding Fees in Statutory Cases: Prevailing Plaintiffs v. Prevailing Defendants*

The Awards Act, Title II, and Title VII provide a “prevailing party” standard for awarding fees.⁹⁴ Another standard frequently utilized in civil rights attorneys’ fees award provisions, however, is that of “prevailing plaintiffs.”⁹⁵ It would therefore seem that prevailing plaintiffs and prevailing defendants would be included where the statute reads “prevailing party.” Nevertheless, the words “prevailing party” have been interpreted to present a dual standard when applied to prevailing plaintiffs as opposed to prevailing defendants.⁹⁶ While prevailing plaintiffs are eligible for fees under these statutes as a matter of course,⁹⁷ “prevailing defendants are eligible only if the litigation is deemed by a court to have been vexatious, brought for purposes of harassment or otherwise brought in bad faith.”⁹⁸

The Supreme Court has addressed the question of the proper standard for allowing fees in civil rights cases only twice. In *Newman*,⁹⁹ the Court set forth the liberal standard of allowing a prevailing plaintiff attorney’s fees unless unjust,¹⁰⁰ and then applied that standard five years later to uphold a fee

88. *Id.* at 402.

89. *Id.*

90. *Id.*

91. *Id.*

92. See note 15 and accompanying text *supra*.

93. 390 U.S. at 402 & n.4.

94. See text accompanying notes 74, 81 & 84 *supra* for the text of these statutory fee provisions.

95. See, e.g., *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Schaeffer v. San Diego Yellow Cab*, 462 F.2d 1002 (9th Cir. 1972); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970).

96. See *Larson, The Civil Rights Attorneys Fees Awards Act of 1976*, 10 CLEARINGHOUSE REV. 778, 779 (1977). Representative Drinan, the sponsor of the Awards Act and floor manager of the House, used the term “dual standard” to describe the application of the prevailing party language. See 122 CONG. REC. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

97. See *Larson, supra* note 96, at 779.

98. *Id.* See text accompanying note 108 *infra*.

99. See notes 85-93 and accompanying text *supra*.

100. 390 U.S. at 402. See notes 85-87 and accompanying text *supra*.

award in *Northcross v. Board of Education*.¹⁰¹ Underlying the *Newman* rationale is the concept that nearly all plaintiffs in these suits are disadvantaged persons who are the victims of unlawful discrimination or unconstitutional conduct, and that it would ordinarily be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the jurisdiction of the federal courts to vindicate their rights.¹⁰² The Supreme Court proceeded on the assumption that the burden upon successful plaintiffs of bearing their own attorneys' fees would result in an inability on the part of aggrieved parties to invoke the injunctive powers of the federal courts.¹⁰³

Until recently, the courts of appeals had been divided on the issue of which standard to employ in determining the appropriate fee award for prevailing defendants in Title VII suits.¹⁰⁴ Some took the position that both plaintiffs and defendants should be treated alike.¹⁰⁵ Others, including the Third Circuit, would approve defendants' applications for attorneys' fees only when the plaintiff's suit was characterized by vexatiousness, bad faith, abusive conduct, or an attempt to harass the opponent.¹⁰⁶ The Supreme Court finally settled this conflict in *Christiansburg Garment Co. v. EEOC*,¹⁰⁷ where it held that attorney's fees should be awarded to a prevailing defendant only when the court concludes that plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."¹⁰⁸

101. 412 U.S. 427, 428 (1973) (per curiam). The attorney's fee provision at issue in *Northcross* was contained in § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1976), which provides:

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 . . . or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id. (citation omitted).

102. See 390 U.S. at 402.

103. *Id.*

104. See text accompanying notes 105 & 106 *infra*.

105. See, e.g., *EEOC v. Bailey Co.*, 563 F.2d 439, 455-56 (6th Cir.), *cert. denied*, 435 U.S. 915 (1977); *United States v. Allegheny-Ludlum Indus.*, 558 F.2d 742, 744 (5th Cir. 1977).

106. See *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 (2d Cir. 1976); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063-64 (8th Cir. 1975); *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975).

107. 434 U.S. 412 (1978). The Court was faced with a suit filed by the EEOC against defendant two years after the Commission had notified the complainant of her right to sue. *Id.* at 414. The complainant had not pursued this right. *Id.* Jurisdiction was alleged under Title VII, as amended in 1972, but the district court granted summary judgment in favor of defendant after finding that the case was not "pending" at the time of the passage of the amendments. *Id.* Defendant then petitioned for an attorneys' fee award under the statutory provisions, but the district court concluded that "the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless," and refused to award a fee. *Id.* at 415 (citation omitted). The Supreme Court affirmed. *Id.* at 424.

108. *Id.* at 422. See text accompanying notes 183-85 *infra*.

5. Summary of a Court's Power to Make a Fee Award

After *Alyeska*, federal courts do not have the power to award attorneys' fees absent the presence of a common fund or bad faith unless such power has been specifically granted by the statute under which the plaintiff seeks relief.¹⁰⁹ In the statutory cases, courts must award fees which further the congressional intent of promoting full enforcement of the substantive rights safeguarded by the statute.¹¹⁰

III. THE REASONABLE ATTORNEY'S FEE— DETERMINATION OF THE AMOUNT TO BE AWARDED

While the entitlement standards which govern an award of attorneys' fees vary,¹¹¹ the language in virtually all of the statutes pertaining to the amount of such an award states that "reasonable" attorneys' fees should be awarded.¹¹² Regardless of whether a court is proceeding under statutory or equitable authority, its decision to award attorneys' fees necessitates the determination of a reasonable amount for such a fee.¹¹³

The United States Supreme Court, however, has not yet decided the issue of the manner in which the fee amount should be determined.¹¹⁴ Consequently, the approaches taken by the courts of appeals reflect different standards for ascertaining fee awards.¹¹⁵ For example, while the First Circuit leaves the manner in which fee awards are determined almost entirely to the discretion of the district court,¹¹⁶ the Fifth¹¹⁷ and Seventh¹¹⁸ Circuits

109. See notes 23-26 and accompanying text *supra*.

110. Berger, *supra* note 2, at 310. See notes 54-66, 76-80, 83 & 85-93 and accompanying text *supra*.

111. See text accompanying notes 74, 81, 84 & 95-108 *supra*.

112. See text accompanying notes 74, 81 & 84 *supra*.

113. See notes 114-23 and accompanying text *infra*.

114. The Supreme Court has never directly considered a question involving the proper amount of a fee award, although it has dealt with entitlement to fees in particular cases. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (§ 1988 award of attorneys' fees); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII award of attorneys' fees); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (private attorney general award of attorneys' fees); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) (equitable rationale for awarding fees in commercial litigation); *Northcross v. Board of Educ.*, 412 U.S. 427 (1973) (award of attorneys' fees under 20 U.S.C. § 1617 (1976)); *Hall v. Cole*, 412 U.S. 1 (1973) (equitable rationale for awarding fees under common benefit rationale); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (award of attorneys' fees under common benefit rationale); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) (Title II award of attorneys' fees); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) (equitable rationale for awarding fees under bad faith doctrine); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (equitable common fund award of attorneys' fees); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (equitable common fund of award of attorneys' fees); *Trustees v. Greenough*, 105 U.S. 527 (1882) (equitable common fund award of attorneys' fees).

115. For a discussion of the varying approaches taken by the courts of appeals, see notes 116-237 and accompanying text *infra*.

116. *Hoitt v. Vitek*, 495 F.2d 219, 221 (1st Cir. 1974).

117. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

118. *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

have promulgated lists of factors to be considered by the district courts in setting fees.¹¹⁹ Moreover, the circuits have often allowed district courts to make fee determinations without articulating the reasons for a particular fee award,¹²⁰ a practice which has led to widespread confusion.¹²¹ In response thereto, the Third Circuit has pioneered a shift in approach by adopting a particular analytical framework for determining fees.¹²² By issuing a series

119. The list of factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), is based upon private fee arrangement guidelines adopted in the ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-106(B), and is that most frequently cited. The *Johnson* court listed twelve factors for the court to consider in arriving at a reasonable fee: 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. 488 F.2d at 717-19.

Almost every court considering an award of attorney's fees adheres to some combination of the *Johnson* factors. See, e.g., *Firebird Soc'y v. Board of Fire Comm'rs*, 556 F.2d 642, 643-44 (2d Cir. 1977); *Firefighters Inst. v. City of St. Louis*, 549 F.2d 506, 516 (8th Cir. 1977); *Stevenson v. Int'l Paper Co.*, 432 F. Supp. 390, 409-10 (W.D. La. 1977).

120. *Berger*, *supra* note 2, at 284. One commentator who has examined this area maintains that until recently the most common approach in setting fees was no approach at all. See *id.* He states: "A review of all decisions reported in volumes 384-94 of *Federal Supplement* (1974-1975) reveals that of the twenty-eight reported cases involving a fee determination, thirteen contain absolutely no articulated reason for the amount awarded." *Id.* A typical example cited by this commentator is a case awarding reasonable attorneys' fees and merely stating: "The court finds that \$2,750.00 is a fair and reasonable attorney's fee for legal services rendered to and for plaintiffs by their counsel in this suit; and Plaintiffs are entitled to recover such reasonable attorney's fee in such amount from the Defendants." *Canterbury v. Dick*, 385 F. Supp. 1004, 1009 (S.D. Tex. 1973).

121. In response thereto, most of the circuits now hold that failure to comprehensively state the reasons for a fee award renders the district court's determination effectively unreviewable and constitutes an abuse of discretion. See, e.g., *Kerr v. Screen Extras Guild*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Monroe v. Board of Comm'rs*, 505 F.2d 105, 108-09 (6th Cir. 1974); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187-88 (D.C. Cir. 1974); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 170 (3d Cir. 1973).

122. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-67 (3d Cir. 1973) (*Lindy I*). The *Lindy I* court stated: "The mere listing of four factors for consideration by the court makes meaningful review difficult and gives little guidance to attorneys and claimants." *Id.*

The Third Circuit initially developed an analytical framework to be used by lower courts in setting fees in fund cases by awarding fees based upon the normal hourly rate for the time expended, adjusted for the contingency of the case and the quality of the attorney's effort as reflected in the court's evaluation of the work it observed, the complexity of the issues, and the result achieved. See *id.* at 166-69. See also *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975); *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974). See notes 123-50 and accompanying text *infra* for a discussion of these cases.

The Third Circuit then developed a "post *Lindy* discretionary adjustment," to be used by the district court in setting fees in statutory civil rights cases. See *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978) (award of attorneys' fees in Title VII class action settlement); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978) (award of attorneys' fees under the Awards Act in § 1982 case); *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). For a discussion of these cases, see notes 151-215 and accompanying text *infra*.

of decisions during the past five years, the Third Circuit has formulated definitional and interpretive guidelines to be used by the lower courts in making fee determinations.¹²³ The first of these decisions to be examined here is *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy I)*.¹²⁴

A. Decisional Guidelines Regarding Attorney Fee Awards in the Third Circuit

1. *Lindy I*

In *Lindy I*,¹²⁵ which arose from a series of antitrust class actions,¹²⁶ the United States District Court for the Eastern District of Pennsylvania had awarded attorneys' fees pursuant to the equitable common fund doctrine.¹²⁷

123. For a discussion of the fee framework and guidelines enunciated by the Third Circuit, see notes 124-215 and accompanying text *infra*.

124. 487 F.2d 161 (3d Cir. 1973).

125. *Id.* *Lindy I* involved the propriety of the district court's award of attorneys' fees from a settlement fund created in a series of plumbing fixture antitrust actions. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972). The United States had obtained criminal antitrust indictments against plumbing fixture manufacturers and their trade association. *Id.* at 1079. Subsequently, some 370 private treble damage actions were filed against the same defendants. *Id.* The Judicial Panel on Multidistrict Litigation then ordered the cases consolidated before a single district court judge. *Id.* The actions were settled, at which time the district court awarded fees to plaintiff's attorneys and their respective firms. *Id.* at 1085-92. The district court deemed this award to be the contribution that those individuals not represented by counsel yet sharing in the settlement should make to the cost of the litigation. *Id.* The award was therefore to come from their share of the settlement. *Id.* Two members of the class objected to this award and appealed. See 487 F.2d 161 (3d Cir. 1973) (*Lindy I*).

The Third Circuit reserved judgment on the question of whether the private clients could credit these monies received by the class attorneys from the fund against their own fee payments. 487 F.2d at 166, 169. On remand, the district court determined that the fees paid under the private agreements should be subtracted from the court's award and thus directed that the unrepresented class pay only \$925,968.61 of the total award of \$1,134,765.45. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 382 F. Supp. 999, 1023-28 (E.D. Pa. 1974).

126. See note 125 *supra*.

127. See *id.* For a discussion of the equitable common fund theory of awarding fees, see notes 11-14, 20-26, 30 & 36-47 and accompanying text *supra*.

The Third Circuit in *Lindy I* stated:

The award of fees under the equitable [common] fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed. Understood in this way, there are two possible 'causes of action' that may be urged as the basis for award of attorneys' fees. One of these 'causes' belongs to the plaintiff who brought the underlying suit. His claim is that by instituting the suit he has performed a service benefiting other class members. . . .

487 F.2d at 165, citing *Trustees v. Greenough*, 105 U.S. 527 (1881). The court further stated:

The second 'cause of action' for award of attorneys' fees under the equitable fund doctrine belongs to the attorney. The attorney's claim is that his conduct of the suit conferred a benefit on all the class members, that one or more class members has agreed by contract to pay for the benefit the attorney conferred upon him, and that the remaining class members should pay what the court determines to be the reasonable value of the services benefiting them.

Id., citing *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 120-21 (1885).

In reviewing this award, the Third Circuit introduced what it termed the "lodestar" method of calculating attorneys' fees for the time they devoted to the lawsuit.¹²⁸ In order to ascertain this amount, an initial determination of "how many hours were spent in what manner by which attorneys" had to be made.¹²⁹ The second step was to fix a reasonable hourly rate for the time each lawyer spent, taking into account his or her reputation, status, and normal billing rate.¹³⁰ The hourly rate should then be multiplied by the number of hours spent by the attorneys.¹³¹ The resulting figure, or the lodestar, was then subjected to adjustments for the contingency of defeat and for unusual quality in the legal skills employed.¹³² In order to make the adjustment for quality, the following factors were considered: 1) the complexity and novelty of the issues presented; 2) the quality of the work that the judge has been able to observe; and 3) the amount of the recovery obtained.¹³³ Furthermore, the Third Circuit emphasized that in determining a fee, the district court should document as specifically as possible the facts that support its conclusion.¹³⁴

128. *Id.* at 167-68.

129. *Id.* at 167. The court enunciated the criteria for attorneys' fees as follows:

In detailing the standards that should guide the award of fees, . . . we must start from the purpose of the award: to compensate the attorney for the reasonable value of the attorney's services. . . . Before the value of the attorney's services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys. . . .

Id.

130. *Id.* The court stated:

After determining . . . the services performed by the attorneys, the district court must attempt to value those services.

. . . . A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate of compensation differs for different activities.

Id.

131. *Id.*

132. *Id.* at 168. The court then stated:

While the amount thus found to constitute reasonable compensation should be the lodestar of the court's fee determination, there are at least two other factors that must be taken into account in computing the value of attorneys' services. The first of these is the contingent nature of success. . . . In assessing the extent to which the attorneys' compensation should be increased to reflect the unlikelihood of success, the district court should consider any information that may help to establish the probability of success.

. . . . The second additional factor the district court must consider is the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled.

Id.

133. *Id.*

134. *Id.* at 169. The court pointed out that the value to be placed on these additional factors will vary from case to case. *Id.* However, the court stated that their value will often bear a reasonable relationship to the aggregate hourly compensation. *Id.*

2. *Lindy II*

Having set forth the standards and guidelines governing an award of attorneys' fees in cases in which an attorney's action leads to the creation of an equitable fund in *Lindy I*,¹³⁵ the Third Circuit refined these formulations in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy II)*.¹³⁶ At the outset, the court emphasized that it did not intend for district courts, in setting attorneys' fees, to "become enmeshed in a meticulous analysis of every detailed facet of the professional representation."¹³⁷ It determined, however, that once the district court in an equitable fund case determined the lodestar, it should inquire separately into the contingency and quality factors and should make specific findings of fact as to each.¹³⁸ The Third Circuit specified factors relevant to what *Lindy I* termed "contingent nature of success,"¹³⁹ pursuant to which the court may increase the amount established in the computation of the lodestar.¹⁴⁰ It stated that the district court should appraise the professional burden undertaken in terms of the probability or likelihood of success¹⁴¹ on the basis of a careful evaluation of the following factors: 1) an analysis of the plaintiff's burden;¹⁴²

135. 487 F.2d 161 (3d Cir. 1973). See notes 125-34 and accompanying text *supra*.

136. 540 F.2d 102, 116-18 (3d Cir. 1976). The court therein stated: "Preliminarily, we reaffirm the standards enunciated in *Lindy I*." *Id.* at 116 (citation omitted). It went on to state that "[n]othing in the augmentation hereinafter set forth should be considered as a dilution or diminution of that basic formula." *Id.* The court added that "we view the foregoing as an implementation of the *Lindy I* formulation." *Id.* at 118.

In its opinion on remand of *Lindy I*, the district court had determined that appellees were entitled to attorneys' fees of \$1,134,765.45 from the settlement fund then valued at \$29.3 million. See 382 F. Supp. at 1024 (E.D. Pa. 1974). See note 123, *supra*. Of this amount the district court ordered members of the third category—the previously unrepresented claimants—to pay \$925,968.61. 382 F. Supp. at 1028.

137. 540 F.2d at 116. The Third Circuit deferred to the trial court's discretion regarding the hourly rate and the multiplier factor, which the trial court based on the quality of the legal services and the contingent risk. *Id.* at 114-15. The Third Circuit also concluded that the district court did not abuse its discretion by doubling the lodestar. *Id.* at 115-16.

138. *Id.* at 117. With respect to the quality factor set forth in *Lindy I*, see text accompanying notes 132 & 133 *supra*, the *Lindy II* court stated it did not intend for a district court to inquire separately into the components of the legal representation, *e.g.*, pleadings, discovery, court appearances, etc. 540 F.2d at 117. Rather, it meant "only that consideration of the quality factor should relate to the overall conduct of the specific case before the court, to wit, 'that particular work,' 'that given activity' for which the fee is awarded." *Id.* (emphasis supplied by the court) (citation omitted).

139. 540 F.2d at 116-17. See text accompanying note 132 *supra*.

140. 540 F.2d at 117.

141. *Id.* Likelihood of success is to be viewed at the time of filing of suit. *Id.*

142. *Id.* The court stated:

Subsumed in this category are the following considerations: (a) the complexity of the case,—legally and factually; (b) the probability of defendant's liability,—whether it is clear or dubious; whether it has been previously suggested by other civil or criminal proceedings; whether it is asserted under existing case law or statutory interpretation, or is advanced as a novel theory; (c) an evaluation of damages,—whether the claims would be difficult or easy to prove.

Id.

2) the risks assumed in developing the case;¹⁴³ and 3) the delay in receipt of payment for services rendered.¹⁴⁴

Under the rubric of "the quality of an attorney's work,"¹⁴⁵ the Third Circuit stated in *Lindy II* that the quality of an attorney's work in general is itself a component of the reasonable hourly rate,¹⁴⁶ and that *Lindy I* permits an adjustment to the lodestar commensurate with the lawyer's degree of skill relative to that expected for lawyers of the caliber reflected in the hourly rates.¹⁴⁷ The court considered such increase or decrease to be in the nature of a "bonus" or "penalty."¹⁴⁸ The *Lindy II* court further explained that in determining whether or not to adjust the lodestar for quality of work, the district court may consider: 1) the result obtained by verdict or settlement, as evaluated in terms of potential money damages available to the class as well as the benefit conferred on the class;¹⁴⁹ and 2) the professional methods utilized in processing the case, rewarding efficiency and penalizing obstruction or delay.¹⁵⁰

B. Recent Decisions in the Third Circuit

1. *Hughes v. Repko*

In *Hughes v. Repko*,¹⁵¹ plaintiffs, husband and wife, appealed from an order of the district court awarding them attorneys' fees after they obtained

143. *Id.* The court further stated:

This category subsumes consideration of: (a) the number of hours of labor risked without guarantee of remuneration; (b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.; (c) the development of prior expertise in the particular type of litigation; recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may aid the court in articulating legal precepts and implementing sound public policy.

Id.

144. *Id.* Finally, the court stated:

If, having considered the foregoing or other relevant criteria, the district court desires to increase the "lodestar" award, it should identify those factors supporting its conclusion, state the specific amount by which the basic fee should be increased due to the contingency of success, and give a brief statement of reasons therefor. We reiterate that any such increment in the "lodestar" award is to be considered and applied apart from the evaluation of the quality of services rendered in the particular proceedings.

Id.

145. *Id.* See notes 132 & 133 and accompanying text *supra*.

146. 540 F.2d at 117.

147. *Id.* at 118 (citation omitted). The court stated that the increase or decrease in the lodestar reflects exceptional services only. *Id.*

148. *Id.*

149. *Id.* (citation omitted).

150. *Id.* The court then allocated the fee award in accordance with the refined *Lindy I* criteria. *Id.* at 118-22.

Judge Gibbons, in a dissent joined by Chief Judge Seitz, took a more conservative position, arguing that since three defendants had been previously convicted, some recovery was "virtually certain." *Id.* at 127-28 (Gibbons, J., concurring in part and dissenting in part). Given that proposition, the dissenters concluded that a "substantial" departure from the lodestar figure was not appropriate. *Id.* However, this seems to imply that some premium, albeit small, was deserved. See *id.* at 129 (Gibbons, J., concurring in part and dissenting in part).

151. 578 F.2d 483 (3d Cir. 1978).

a jury verdict against one of two defendants in a section 1982 action.¹⁵² Plaintiffs argued on appeal that the amount of their award was insufficient.¹⁵³ The victorious defendant also appealed, arguing that he was a prevailing party within the meaning of the Awards Act.¹⁵⁴

Plaintiffs had asserted two claims against each of the defendants, one alleging discrimination in violation of section 1982¹⁵⁵ and the other alleging a conspiracy in violation of section 1985.¹⁵⁶ The district court directed a verdict in favor of both defendants on plaintiffs' section 1985 claim,¹⁵⁷ and directed a verdict for one defendant on the section 1982 claim.¹⁵⁸ It thereupon awarded attorneys' fees in accordance with the Awards Act,¹⁵⁹ purporting to follow the principles announced in *Lindy II*.¹⁶⁰ When plaintiffs attacked the legal bases for the district court's fee determination in their appeal,¹⁶¹ the Third Circuit once again analyzed the proper method for calculating the lodestar in such circumstances.¹⁶²

152. *Id.* at 485. See 42 U.S.C. § 1982 (1976). Plaintiffs, black citizens, instituted this action for damages against defendants, Mr. and Mrs. Repko, white citizens, "alleging that the defendants refused to rent them an apartment owned by Mrs. Repko because they were black." 578 F.2d at 485.

153. *Id.* at 486.

154. *Id.* See 42 U.S.C. § 1988 (1976).

155. 578 F.2d at 485. See 42 U.S.C. § 1982 (1976).

156. 578 F.2d at 485. See 42 U.S.C. § 1985 (1976).

157. 578 F.2d at 485.

158. *Id.* The successful defendant on the § 1982 claim was Mr. Repko. See note 152 *supra*.

At the time plaintiffs' counsel was retained, he agreed with his clients that his fee would be limited to any amount awarded by the court. 578 F.2d at 485. Plaintiffs' counsel applied for a fee of \$3,850, based on 55 hours of legal service at \$70.00 per hour. *Id.* The number of hours spent and the hourly rate appear to have been found reasonable by the district court and were not challenged on appeal. *Id.* See *Hughes v. Repko*, 429 F. Supp. 928 (W.D. Pa. 1977).

159. 578 F.2d at 485. See 42 U.S.C. § 1988 (1976). For a discussion of the Awards Act, see notes 54-74 and accompanying text *supra*.

160. 578 F.2d at 486. For a discussion of *Lindy II*, see notes 135-50 and accompanying text *supra*.

The district court decided that the amount of the lodestar (hours of service multiplied by hourly rate) "should be proportionate to the extent the plaintiffs prevailed in the suit." *Hughes v. Repko*, 429 F. Supp. 928, 932 (W.D. Pa. 1977). It found that defendants prevailed on over two-thirds of the legal issues involved, and proceeded to reduce the lodestar by approximately two-thirds, to a net figure of \$1,275.00. *Id.*

The district court also considered other factors which it felt should affect the lodestar in terms of the quality of counsel's work and the contingency of success. *Id.* It found the quality of the work to have been "good," but the case a "simple" one. *Id.* The district court also decided that the "contingency factor" was largely absent because plaintiffs' counsel showed his confidence of success by not entering into a contingent fee contract with his clients. *Id.* Finally, the district court felt that plaintiffs' ability to pay their counsel was a factor to be considered in reducing the lodestar, because Congress had mandated recognition of that factor under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1976), an act the court said provided a remedy similar to that accorded by § 1982. 429 F. Supp. at 933. Based on its consideration of the foregoing factors, the district court concluded that the lodestar should be reduced further, and awarded plaintiffs' counsel a fee of \$700.00, rather than the initial \$3,850.00 requested. *Id.*

161. 578 F.2d at 486.

162. *Id.* See also *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (*Lindy II*); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*).

a. *Prevailing Party*

After stating that the critical first step in fixing a reasonable attorneys' fee under the Awards Act is the determination of the lodestar,¹⁶³ the Third Circuit held that the district court's automatic reduction of two-thirds of the lodestar since plaintiffs had not prevailed on two-thirds of their claims was legally impermissible.¹⁶⁴ In interpreting the "prevailing party" language of the Awards Act,¹⁶⁵ the court recognized that it is not always easy to determine the prevailing party, particularly where there are multiple claims and/or multiple parties, and where the petitioning party is not completely successful.¹⁶⁶ The *Hughes* court stated, however, that "to apply the 'prevailing party' language of the . . . [Awards Act] fairly, we think district courts should analyze the results obtained by the petitioning party on particular claims regardless of the number of parties,"¹⁶⁷ and should consider the prevailing party to be the one who can be said to have essentially succeeded on such claims.¹⁶⁸

While the Third Circuit stated that a fee petitioner who is totally unsuccessful in asserting a claim cannot be treated as a "prevailing party" within the spirit of the Awards Act,¹⁶⁹ it concluded that plaintiffs in the instant case should be treated as prevailing parties because they had essentially prevailed on their section 1982 claim against one defendant, even though all aspects of their claims were not successful.¹⁷⁰ The court, therefore, held that where a party has succeeded on only some of its claims, *Lindy I* demanded that the district court specifically determine the number of hours spent on the successful claim.¹⁷¹ The *Hughes* court thus considered an automatic percentage reduction in the lodestar and an unanalyzed allocation of hours in calculating the lodestar to be "legally impermissible."¹⁷²

163. 578 F.2d at 487.

164. *Id.* See note 160 *supra*. See also *Prandini v. National Tea Co.*, 585 F.2d 47, 52 (3d Cir. 1978). For a discussion of *Prandini*, see notes 186-215 and accompanying text *infra*.

165. 578 F.2d at 487. For the pertinent text of the Awards Act, see text accompanying note 74 *supra*.

166. 578 F.2d at 486.

167. *Id.* The court stated that "claim" is meant as "claim" is used in FED. R. CIV. P. 10(b). *Id.* at 487.

168. 578 F.2d at 486-87.

169. *Id.* Since the plaintiffs were denied punitive damages, they were not totally successful on their § 1982 action. *Id.* Yet they were essentially successful because they won the verdict and obtained an award. *Id.*

170. *Id.*

171. *Id.* at 487.

172. *Id.* The court stated:

In evaluating what laws are reasonably supportive, we believe *Lindy II* and *Merola II* require the district court to determine not only the number of hours actually devoted to the successful claims, but also whether it was reasonably necessary to spend that number of hours in order to perform the legal services for which compensation was sought.

Id. In *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975) (*Merola II*), the Third Circuit had declared that the quality of the attorney's work factor is evidenced by the work observed, the complexity of the issues and the recovery obtained. In settled cases, the second additional factor [quality] is reflected largely in the benefit produced. It permits the court to recognize and reward achievements of a particularly

The Third Circuit also found no support in *Lindy II* for the proposition that the lodestar should be reduced due to the simplicity of the case.¹⁷³ Furthermore, the court held that the Awards Act, which is explicitly applicable to fees awarded in successful actions under section 1982,¹⁷⁴ does not consider the ability to pay a factor in determining the amount of a fee award.¹⁷⁵

With respect to the factors that should be considered in arriving at a reasonable fee, the court noted that the congressional history of the Awards Act¹⁷⁶ as well as the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*¹⁷⁷ offer some guidance.¹⁷⁸ It noted, however, that the factors mentioned in the congressional history and the case law in connection with the determination of "reasonableness" are the same factors that would have been considered by the district court when calculating the lodestar through a determination of the number of hours reasonably supportive of successful claims and the establishment of the reasonable hourly rate.¹⁷⁹

Finally, with respect to the lodestar, the Third Circuit emphasized, as did Congress when it enacted the Awards Act,¹⁸⁰ that the district court

resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested, or to reduce the objectively determined fee where the benefit produced does not warrant awarding the full value of the time expended.

Id. at 168-69. See 487 F.2d at 168.

173. 578 F.2d at 487. The court also stated that there was no support in *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975), for a lodestar reduction because of simplicity. *Id.* See note 172 *supra*. On the other hand, the court stated that simplicity of the issues involved should be reflected in the court's determination of the hours reasonably devoted to the successful claims, a determination that must be made in arriving at the lodestar itself. 578 F.2d at 487. Any other approach would penalize attorneys regardless of the number of hours reasonably devoted to successful claims. *Id.*

174. 578 F.2d at 488. See text accompanying notes 54 & 74 *supra*.

175. 578 F.2d at 488.

176. *Id.* & n.7. See text accompanying note 74 *supra*.

177. 488 F.2d 714, 717-19 (5th Cir. 1974). See notes 117 & 119 and accompanying text *supra*.

178. 578 F.2d at 488 & n.7. The court stated:

For example, the House Judiciary Committee Report stated: The third principal element of the bill is that the prevailing party is entitled to 'reasonable' counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered. . . . Accord: *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); see also *United States Steel Corp. v. United States* [519 F.2d 359 (3d Cir. 1975)].

Id., citing H. REP. NO. 94-1558, 94th Cong., 2d Sess. 8 (1976).

179. 578 F.2d at 488.

180. *Id.* & n.8 The Third Circuit noted that the Awards Act was passed in response to *Aleyska*, and that Congress was recognizing the importance of private vindication of civil rights. *Id.* See notes 70-73 and accompanying text *supra*. The court quoted the following:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

578 F.2d 488 n.8 quoting S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. CODE. CONG. & AD. NEWS 5908, 5910. Accord, H. REP. NO. 94-1558, 94th Cong., 2d Sess. 1 (1976).

should evaluate the fee to be awarded in light of the important substantive purposes of the Civil Rights Act upon which plaintiffs relied.¹⁸¹ It did not, however, identify the underlying substantive purposes of section 1982.¹⁸²

b. Defendant's Appeal

With respect to the prevailing defendant's claim for an attorneys' fee award,¹⁸³ the Third Circuit recognized that a prevailing defendant may in certain circumstances recover his fees in light of the Supreme Court's pronouncement in *Christianburg Garment Co. v. EEOC*.¹⁸⁴ The *Hughes* court, however, held that since this action was not brought to harass, embarrass, or abuse defendants, it was not the type of case for which the Supreme Court mandated recovery of fees for prevailing defendants.¹⁸⁵

2. *Prandini v. National Tea Co.*

In *Prandini v. National Tea Co. (Prandini II)*,¹⁸⁶ the Third Circuit was faced with a second appeal¹⁸⁷ concerning the award of attorneys' fees pursuant to a settlement of a Title VII class action.¹⁸⁸ The attorneys who had represented plaintiffs made the following contentions regarding the district court's fee award: 1) that the district court erred in making a percentage reduction based on alleged duplication of services between the instant case

181. 578 F.2d 489, citing 42 U.S.C. § 1982 (1976). See text accompanying note 155 *supra*.

182. Presumably, the court had in mind the strong policy of providing private citizens with an opportunity to assert their civil rights and recover the cost to do so. See text accompanying notes 54, 59 & 70-74 *supra*.

183. See text accompanying note 154 *supra*.

184. 578 F.2d at 487, citing *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). For a discussion of *Christianburg*, see notes 107 & 108 and accompanying text *supra*.

185. 578 F.2d at 489. See note 108 and accompanying text *supra*. For an outline of the majority opinion in *Hughes*, setting out with particularity the operation by which a district court is to award attorneys' fees in the nonfund context, see 578 F.2d at 489 (Roseenn, J., concurring); *id.* at 491 (Carth, J., concurring).

186. 585 F.2d 47 (3d Cir. 1978).

187. See *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) (*Prandini I*). In *Prandini I*, the Third Circuit had merely announced a supervisory rule requiring that in settlements of cases involving statutorily authorized attorneys' fees, the damage settlement in favor of the plaintiffs should be made first and separate from the award of attorneys' fees. *Id.* at 1021. Only after court approval of the damage settlement should negotiation for appropriate attorneys' fees begin. *Id.*

188. 585 F.2d at 49. See notes 75-81 and accompanying text *supra*. The settlement involved two funds—a "damages fund" payable in full to plaintiffs, and an "attorneys' fees fund" payable as approved by the court to the attorneys. 585 F.2d at 49. "Defendant National Tea Co. (National) had settled the plaintiff's claims by agreeing to pay the plaintiff class approximately \$100,000.00, plus expenses (calculated at \$18,000.00)." *Id.* "The settlement also provided that National would pay reasonable attorneys' fees as awarded by the district court, up to \$50,000.00." *Id.* To the extent that the "attorneys' fees fund" exceeded the amount awarded as reasonable by the district court, that excess would revert back to defendants. *Id.*

After a hearing on attorneys' fees, the district court awarded a total of \$35,000.00 in fees. *Id.* On appeal, the court vacated the district court judgment and remanded for further proceedings, holding that the district court had not made the findings required by *Lindy I*, *Lindy II*, and *Prandini I*. *Id.*

and another;¹⁸⁹ and 2) that the district court erred by refusing to award a fee for the successful appeal of the first fee award and the time spent in the preparation of the fee petition.¹⁹⁰

In sustaining appellants' first contention,¹⁹¹ the court restated its holding in *Hughes*:¹⁹² "The clear thrust of *Hughes* is that district courts, in awarding attorneys' fees, may not reduce an award by a particular percentage or amount (albeit for justifiable reasons) in an arbitrary or indiscriminate fashion . . . it must make specific findings to support its action."¹⁹³ The court further emphasized "the importance this Circuit has placed upon the need to identify *specifically* the lodestar components,"¹⁹⁴ stating:

It is true that our decisions concerning attorneys' fees have in each instance required an analysis to be made of hours and rates. Yet until *Hughes* we had not clearly required that the allocation of hours for the purpose of determining the lodestar be analyzed so precisely, nor had we held that an automatic percentage reduction in the lodestar is 'legally impermissible.'¹⁹⁵

With respect to the contention that the successful appeal of the first fee award, and the time spent preparing the fee petition therefore, should be compensated,¹⁹⁶ the Third Circuit stated that the district court was in error in relying on *Lindy II* to justify withholding such compensation.¹⁹⁷ The

189. 585 F.2d at 51-52. The district court also reduced the number of hours by 10 percent for all attorneys except one. *Id.* at 50. The reduction was based on a purported overlapping of work with prior counsel in a prior and nearly identical case. *Id.*

190. *Id.* at 52-54. The district court had refused to award any attorneys' fees for the time spent in successfully appealing the first fee award and in preparation of fee petitions. *Id.* at 50.

The district court also reduced the attorneys' hourly rate from \$60 to \$40. *Id.* The attorneys argued on appeal that this reduction had been impermissibly based upon the district court's belief that the attorneys had engaged in a fee splitting arrangement in violation of the CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-107(A)(2). 585 F.2d at 50. The majority found that the district court had not relied upon this factor, however, but rather that the district judge felt that, since the attorneys were willing to pay another attorney \$20 per hour for doing no work, they only valued their services at \$40 per hour. *Id.* The court thus found this to be a permissible reduction. *Id.*

The Third Circuit in *Prandini II* did not decide the issue of whether a district court, in awarding attorneys' fees, may consider an attorney's unethical conduct as a factor in its determination of a "reasonable" fee. 585 F.2d at 50 n.3. It did state, however, that it was inclined toward the view that it is within the district court's discretion to do so. *Id.*, citing *Hughes v. Repko*, 578 F.2d 483, 491-93 (3d Cir. 1978) (Garth, J., concurring).

191. See note 189 and accompanying text *supra*. The court found that the evidence on the record did not support the percentage reduction imposed by the district court. 585 F.2d at 51.

192. 585 F.2d at 51-52. See notes 170-72 and accompanying text *supra*.

193. 585 F.2d at 52, citing *In re Meade Land and Dev. Co.*, 577 F.2d 853 (3d Cir. 1978). The court held that since the district court made no specific findings of duplication or overlap, that portion of the opinion reducing the award by an overall 10 percent must be reversed. 585 F.2d at 52.

194. 585 F.2d at 52 (emphasis supplied by the court).

195. *Id.*, citing *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978).

196. See note 190 and accompanying text *supra*.

197. 585 F.2d at 52. The district court had concluded that the case was controlled by *Lindy II*, wherein it was held: "[t]here being no benefit to the fund from services performed by [attorneys] in connection with their fee application, there should be no attorneys' fee award

Third Circuit distinguished *Lindy II* from the instant case on the basis that *Lindy II* was an equitable common fund case, and, as such, attorneys' fees were paid out of the fund.¹⁹⁸ Any increase in attorneys' fees in such a case would necessarily result in a decrease in plaintiffs' actual recovery.¹⁹⁹ The court noted that while attorneys' fees are nevertheless awarded out of the fund in such cases since the attorneys' services benefitted the fund by creating, increasing, or preserving it,²⁰⁰ an attorney's time expended in connection with the fee application or a fee appeal could not justifiably be compensated out of the fund since such services do not benefit the fund.²⁰¹ Indeed, the court determined that it is at this point that the attorney's interest becomes adverse to the interests of the class which he represents.²⁰²

The Third Circuit stated, however, that such a rationale is inapposite in the instant case since it is not an equitable fund case.²⁰³ The court held that in cases involving a statutorily authorized attorneys' fee award,²⁰⁴ the considerations of *Lindy II* and the equitable fund cases do not apply.²⁰⁵ The *Prandini II* court thus held that the attorneys were entitled to be compensated for time spent in successfully appealing the fee award and in preparing the fee petition.²⁰⁶ In distinguishing *Prandini II* from *Lindy II*, the court viewed as dispositive the fact that any of the money awarded for fees which is not actually allocated to the attorney would not augment the amount of plaintiffs' settlement fund,²⁰⁷ as it would in the common fund situation, but rather would be returned to the defendant.²⁰⁸

Finally, the court outlined the policy reason supporting this ruling.²⁰⁹ Recognizing that "[i]f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for the hours expended on the case will be decreased,"²¹⁰ the Third

from the fund for these services." *Id.* (citation omitted). See text accompanying notes 41-45 *supra*.

198. 585 F.2d at 52 (citation omitted). See note 127 *supra*.

199. 585 F.2d at 52 (citation omitted).

200. *Id.*

201. *Id.* at 53.

202. *Id.*, citing *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977).

203. 585 F.2d at 53.

204. *Id.* The \$50,000.00 ceiling on the ultimate fee which could be awarded (characterizing it as a "fund") does not implicate *Lindy II*. *Id.* See note 188 and accompanying text *supra*. The court determined that the \$50,000.00 ceiling signifies only that any award approved by the court must be pro-rated to the extent it exceeds \$50,000.00. 585 F.2d at 53. The "fund" characterization has little analytical value, because in this case "attorneys' fees fund" is separate from the plaintiffs' "damages fund." *Id.*

205. 585 F.2d at 49, 53. See 42 U.S.C. § 2000e-5(k) (1976); text accompanying notes 75-81 *supra*.

206. 585 F.2d at 53-54.

207. *Id.* at 53.

208. *Id.* Compare text accompanying notes 20-26, 30 & 36-47 *supra* (regarding a court's equitable power to award fees) with text accompanying notes 48-110 *supra* (regarding a court's statutory power to award fees).

209. 585 F.2d at 53. The court stated that since statutorily authorized fees are not paid out of plaintiffs' recovery, and the attorneys in seeking their fee are not acting adversely to the plaintiffs' interest, the time expended by them in obtaining a reasonable fee is justifiably included in the court's fee award. *Id.*

210. *Id.*

Circuit expressed concern that attorneys would be hesitant to accept Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized.²¹¹ Such a result, the *Prandini II* court maintained, "would not comport with the purpose behind most statutory fee authorizations, viz, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies."²¹² The court also cited other cases in which statutory fee awards had included compensation for the time spent on the fee application and successful fee appeals.²¹³

In dissent, Judge Weis argued that attempts to simplify often lead to increased complexity, and that the Third Circuit's efforts to make the determination of a reasonable fee more precise have led only to confusion.²¹⁴ He maintained that *Prandini II* does comport with the *Lindy II* rule, and that there should be no award to attorneys for the services performed in securing their own fees.²¹⁵

IV. THE STATE OF THE LAW AFTER *Hughes* AND *Prandini II*

The Third Circuit's introduction of some measure of consistency into fee calculations by the analytical framework established in the *Lindy* line of cases²¹⁶ is admirable in lieu of the lack of uniformity that continues to pervade other circuit court decisions.²¹⁷ It would clearly be unfair, especially in civil rights cases, to subject litigants and attorneys who are similarly situated to widely differing treatment.²¹⁸

A close scrutiny of *Hughes* and *Prandini II* however, reveals a scheme for analyzing fee awards which could result in more confusion in an already complicated area.²¹⁹ As Judge Weis argued in his dissenting opinion in *Prandini II*,²²⁰ the Third Circuit's efforts to make the determination of reasonable fees more precise by refining and qualifying the standards set out in *Lindy I* and *Lindy II*²²¹ will lead to increased confusion and complex-

211. *Id.*

212. *Id.* (citations omitted).

213. *Id.* at 53-54, citing *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977); *Panior v. Iberville Parish School Bd.*, 543 F.2d 1117 (5th Cir. 1976); *Hairston v. R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd*, 561 F.2d 320 (D.C. Cir. 1977); *Torres v. Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978) (Supreme Court specifically declined to consider the propriety of a fee award).

214. 585 F.2d at 54 (Weis, J., dissenting).

215. *Id.* at 55 (Weis, J., dissenting).

216. See notes 125-215 and accompanying text *supra*.

217. See *Berger*, *supra* note 2, at 292.

218. *Id.*

219. See text accompanying note 214 *supra*. See generally *Berger*, *supra* note 2.

220. 585 F.2d at 54 (Weis, J., dissenting). See text accompanying notes 214 & 215 *supra*.

Judge Weis stated: "The case law on counsel fees offers some proof of validity to the adage that attempts to simplify often lead to increased complexity and efforts to clarify frequently cause only confusion." 585 F.2d at 54 (Weis, J., dissenting).

221. See notes 151-213 and accompanying text *supra*.

ity.²²² The guidelines established in *Lindy I* and *Lindy II* were intended to be used by district courts as "route markers in groping for that elusive concept 'reasonable compensation.'" ²²³ Although the ultimate result is a "specific figure wearing an air of precision, we must not forget that it is, after all, a product of compromise, estimates, and inevitably, subjective evaluation."²²⁴

Furthermore, under the equitable common fund cases, the basis of the fee determination is an unjust enrichment rationale,²²⁵ which takes into account the time expended by the attorney.²²⁶ Although policy considerations lead to the same conclusion in statutory cases,²²⁷ many of the statutes that provide for fee awards do not permit monetary recoveries.²²⁸ Some commentators thus maintain that it is virtually impossible in such cases to translate the result of the lawsuit into quantitative terms.²²⁹ In the continued absence of Supreme Court guidance,²³⁰ it can only be hoped that the Third Circuit's attempts to simplify the determination of a reasonable fee will not further confuse the district courts and will be followed by other circuits in a trend toward uniformity.²³¹

Although the *Lindy* line of cases involved antitrust violations,²³² it is clear from *Hughes* and *Prandini II* that *Lindy* established the analytical framework for an award of attorneys' fees to be utilized in civil rights cases. In distinguishing *Hughes* and *Prandini II* from *Lindy* on the basis that the former cases involve an award of fees pursuant to statute while the latter involves an award under the equitable common fund doctrine, however, the Third Circuit has established a point of departure from the *Lindy* framework when evaluating statutory civil rights cases.²³³ The district courts must therefore be cautious in adjusting the *Lindy* framework to comport with the Third Circuit's recent pronouncements in *Hughes* and *Prandini II*.

In statutory cases, such as *Hughes* and *Prandini II*, the district court, once having determined the *Lindy* amount,²³⁴ is now required to consider an adjustment to that amount so as to further the "important substantive purposes" of the statute which authorizes the fee award.²³⁵ For example,

222. 585 F.2d at 54 (Weis, J., dissenting).

223. *Id.*

224. *Id.*

225. See notes 36-47 and accompanying text *supra*.

226. See notes 128-32 and accompanying text *supra*.

227. Berger, *supra* note 2, at 316.

228. See text accompanying notes 74, 81 & 84 *supra*.

229. Berger, *supra* note 2, at 316.

230. See note 114 and accompanying text *supra*.

231. At least two other circuits have followed the Third Circuit's lead in *Lindy I* and *Lindy II* in an effort to curb excessive attorneys' fees in class action litigation. See *City of Detroit v. Grinnell Corp.*, 575 F.2d 1009 (2d Cir. 1977); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

232. See notes 125 & 126 and accompanying text *supra*.

233. See notes 196-213 and accompanying text *supra*.

234. See notes 128-34 & 137-50 and accompanying text *supra*.

235. 578 F.2d at 492 & n.5 (Garth, J., concurring).

the award in *Hughes* was made pursuant to the Awards Act.²³⁶ The district court should therefore take into account the "private attorney general" policy behind the Awards Act and should further consider

the importance of the constitutional right and congressional policy which has been vindicated; the number of citizens who have been benefited or whose rights have been vindicated (either as class members or through *stare decisis*); the extent of the constitutional violation which has been remedied (*i.e.*, how widespread or pervasive was the civil rights violation); whether the attorney has successfully advanced a novel theory or interpretation; [and] the extent to which the public interest has been served.²³⁷

In sum, *Hughes* and *Prandini II* require district courts to make an adjustment to the *Lindy* amount in nonfund statutory civil rights cases which accounts for all of the factors relevant to reasonableness and the substantive purposes of the statute under which the fee is awarded.²³⁸ Furthermore, these factors must be articulated and supported by the record.²³⁹

It is further submitted that the court's holding in *Prandini II* that in statutory fee cases, as distinguished from equitable common fund cases, attorneys are entitled to compensation for the time spent on the fee application and on successful fee appeals, is justifiable.²⁴⁰ In reaching this conclusion, the Third Circuit properly considered the possibility of attorneys becoming apprehensive of litigating civil rights cases.²⁴¹ Since statutory attorneys' fees provisions are intended to achieve the fullest possible enforcement of the underlying policies of those statutes,²⁴² reasonable attorneys' fees thereunder are those which will serve that purpose best.²⁴³

Recent surveys have indicated and commentators have maintained, however, that statutory fee awards under civil rights statutes have been substantially lower than awards under antitrust, securities, and other fee statutes.²⁴⁴ This is justified by some courts²⁴⁵ and commentators²⁴⁶ as a "public interest discount" on the grounds that attorneys have a professional re-

236. *Id.* at 485. See note 159 and accompanying text *supra*.

237. 578 F.2d at 492 n.5. (Garth, J., concurring), citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

238. 578 F.2d at 492 (Garth, J., concurring).

239. *Id.* at 493 (Garth J., concurring); 585 F.2d at 52.

240. 585 F.2d at 52-54. See text accompanying notes 196-213 *supra*.

241. 585 F.2d at 53. See text accompanying notes 211 & 212 *supra*.

242. See text accompanying notes 54-73, 76-80, 83 & 85-93 *supra*.

243. See notes 74, 81, 84, 112-13 and accompanying text *supra*; Berger, *supra* note 2, at 310.

244. Berger, *supra* note 2, at 310-11.

245. See, e.g., *Souza v. Travismo*, 512 F.2d 1137, 1140-41 (1st Cir.), *vacated and remanded*, 423 U.S. 809 (1975); *National Resources Defense Council Inc. v. EPA*, 484 F.2d 1331, 1338-39 (1st Cir. 1973).

246. Berger, *supra* note 2, at 311.

sponsibility to represent clients who are unable to pay²⁴⁷ and to bring suits that are in the public interest.²⁴⁸ The practical effect, however, of awarding fees in antitrust cases that are four to five times higher than those awarded in Title VII or Title II cases is to make antitrust cases financially more attractive to the legal profession.²⁴⁹ It is submitted, therefore, that since the incentive to participate in public interest litigation is already diminished by the prospect of a smaller fee award, the Third Circuit is justified in not further discouraging attorneys from representing indigent clients and from acting as private attorney generals by allowing them the costs incurred on their fee applications and appeals.

V. CONCLUSION

It is submitted that with a better understanding of the Third Circuit's statutory and decisional guidelines respecting attorneys' fee awards in civil rights cases, the Bar will be able to more successfully represent clients in such complex litigation. In light of *Hughes* and *Prandini II*, however, the district courts' task of determining reasonable attorneys' fees has become more complex. Attorneys confronted with an award question should therefore attempt to assist the district courts in comporting with the Supreme Court's and Third Circuit's recent pronouncements of law regarding attorney fee awards.

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247. See notes 245 & 246 *supra*; *Gilpen v. Kansas State High School Activities Ass'n*, 377 F. Supp. 1233, 1253 (D. Kan. 1974) (attorneys should not be motivated by a desire for profit but by public spirit and sense of duty).

248. See, e.g., *Gilpen v. Kansas State High School Activities Ass'n*, 377 F. Supp. 1233, 1253 (D. Kan. 1974).

249. Berger, *supra* note 2, at 311.

ATTORNEYS' FEES—SOVEREIGN IMMUNITY—SOVEREIGN IMMUNITY
BARS AWARD OF ATTORNEY'S FEES AGAINST THE UNITED STATES IN
ACTION UNDER TITLE VI.

Shannon v. HUD (1978)

Plaintiffs prevailed in a suit against the United States Department of Housing and Urban Development (HUD)¹ when the United States Court of Appeals for the Third Circuit held that HUD had violated several federal statutes,² including Title VI of the Civil Rights Act of 1964 (Title VI).³ On remand, the district court entered judgment for the plaintiffs,⁴ who thereafter petitioned the district court⁵ under the then newly enacted Civil Rights Attorney's Fees Awards Act of 1976 (Attorney's Fees Act or Act)⁶ for an award of attorney's fees.⁷ The district court denied plaintiffs' petition⁸ and the Third Circuit affirmed,⁹ holding that an award of attorney's fees against a department of the federal government for a violation of Title VI was barred

1. *Shannon v. HUD*, 577 F.2d 854, 855 (3d Cir.) (per curiam), cert. denied, 99 S.Ct. 611 (1978).

2. *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970). The plaintiffs, who were local businessmen, property owners, and residents, had brought a class action against HUD and additional defendants, the Secretary of the Department and two regional administrators, challenging HUD's approval of a deviation from an urban renewal plan without hearings. *Shannon v. HUD*, 305 F.Supp. 205, 207, 212 (E.D. Pa. 1969), vacated, 436 F.2d 809 (3d Cir. 1970). The district court dismissed the complaint. 305 F. Supp. at 225. The Third Circuit vacated the district court's order, holding that defendants' failure to consider the possible impact of changes in an urban renewal plan on the racial composition of an area violated the Housing Act of 1949, 42 U.S.C. § 1450 (1976), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1976). 436 F.2d at 821-22.

3. 42 U.S.C. § 2000d (1976). Title VI prohibits discrimination in federally funded projects based on race, color, or national origin. *Id.* The Supreme Court has held that Title VI applies to federally funded housing projects. *Hill v. Gatreaux*, 425 U.S. 284, 301 (1976).

4. 577 F.2d at 855. The district court entered judgment for the plaintiffs in May, 1975. *Id.*

5. *Shannon v. HUD*, 433 F.Supp. 249, 251 (E.D. Pa. 1977), aff'd, 577 F.2d 854 (3d Cir.) (per curiam), cert. denied, 99 S.Ct. 611 (1978). Plaintiffs has previously petitioned the district court under a fee shifting provision in Title VIII, 42 U.S.C. § 3610 (1976), but the court held the provision inapplicable to the violation found by the court of appeals, and denied plaintiffs' petition. *Shannon v. HUD*, 409 F. Supp. 1189 (E.D. Pa. 1976). Although no appeal was taken, plaintiffs did except to the clerk's taxation of costs and petitioned the court to reconsider the attorney's fees question under Title VI. 433 F. Supp. at 251.

6. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1976)). For the text of this Act, see note 47 *infra*.

7. 433 F. Supp. at 251. The court cited the recent promulgation of the Act, which allowed fee shifting under Title VI, as a "reason justifying relief from the operation" of the previous order denying attorney's fees." *Id.*, citing FED. R. Civ. P. 60(b)(6). See note 5 *supra*.

8. 433 F. Supp. at 252.

9. The case was heard by Judges Hunter and Weis and by Judge Layton of the United States District Court for the District of Delaware, sitting by designation. The court issued a per curiam opinion.

by the doctrine of sovereign immunity. *Shannon v. HUD*, 577 F.2d 854 (3d Cir.) (per curiam), *cert. denied*, 99 S.Ct. 611 (1978).¹⁰

The doctrine of sovereign immunity, which immunizes the government from suit absent the consent of the legislature,¹¹ was well established in England at the time of the adoption of the Constitution.¹² American critics

10. *Accord*, *Southeast Legal Defense Group v. Adams*, 436 F. Supp. 891 (D. Or. 1977).

11. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-89 (1949). The operation of the doctrine cannot be abrogated simply by naming as party defendant a government official rather than the government itself. *Id.* at 689-96. If the official were acting within his valid authority, the suit fails as one against the government. *Id.* at 691 n.11. If the government official acted outside of his authority or on invalid authority but "the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property," the suit fails as one against the government. *Id.* (citations omitted). This rule, originally stated as a supposition, has been elevated by reflexive citation to a mandatory conclusion. Note, *Administrative Law—Sovereign Immunity Does Not Bar Suit Under Title VI of the Civil Rights Act For Renewal of Federal Funding*, 52 TEX. L. REV. 1210, 1212 (1974).

12. Jaffe, *Suits Against Governments And Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963). Historically, the doctrine of sovereign immunity has been said to be derived from the concept that "the King can do no wrong." *Id.* at 4. Professor Jaffe believes that this maxim was simply intended to mean that the King *shall* do no wrong, and was actually unrelated to the development of the doctrine. *Id.* Instead, he finds the doctrine's origin in the peculiarities of English procedural law. *Id.* at 3-4. He maintains that the sovereign was immune without his consent, not because he was above the law, but rather because he was perceived as its source. *Id.* at 3. Since the King was the source of the law, all writs issued from him. *Id.* For this reason, Professor Jaffe contends, an individual with a cause of action against the Crown could not secure a writ necessary to institute an action, as it would be a logical anomaly for the King to issue or enforce a writ against himself. *Id.* at 3-4. To remedy this situation a procedure in lieu of a writ was developed whereby a citizen could petition the King requesting his consent to be sued. *Id.* at 3. The doctrine thus developed that the Crown could not be sued *eo nomine* without its consent. *Id.* at 2.

By comparison, Justice Holmes placed the doctrine's origin on broader, philosophical grounds when he said: "A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

The doctrine was accepted by American courts despite the theoretical problem of assimilating a concept based upon a figurehead that did not exist in the United States. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* is representative of the theoretical debate which preceded the doctrine's acceptance. Despite a strong dissent from Justice Iredell, *id.* at 429 (Iredell, J., dissenting), the Court held that an individual state was not immune from suit. *Id.* at 480. The decision led directly to the enactment of the eleventh amendment, according to one commentator. Note, *supra* note 11, at 1211. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. In a case decided after the adoption of the eleventh amendment had settled the doctrine's applicability to the states, Chief Justice Marshall assumed that the doctrine barred suits against the United States as well. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 262, 411 (1821).

In England, petitions of right, the procedure used for obtaining consent, were liberally granted and were only required to sue the Crown by name. Jaffe, *supra* at 2. When the doctrine was adapted to fit the American political system, however, the liberal English procedures for circumventing the sovereign's immunity were lost. Note, *supra* note 11, at 1211 n.5. In situations where a simple petition of right would have permitted suit against the Crown, the American courts found that, by analogy, consent of the legislature was required. *Hill v. United States*, 50 U.S. (9 How.) 385, 389 (1850) (comparing a petition of right to legislative action). See, e.g., *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Chemical Foundation*, 272 U.S. 1, 20 (1926); *Fitzgerald v. United States Civil Serv. Comm'n*, 554 F.2d 1186, 1189

of the doctrine protested the anomaly of a government of the people which was not answerable to the people in the courts.¹³ In response to growing disapproval of the doctrine,¹⁴ Congress began to increase the accountability of the federal government as early as 1855.¹⁵

Any doubts regarding the doctrine's continued viability, however, were resolved in its favor by the Supreme Court's decision in *Larson v. Domestic & Foreign Commerce Corp.*¹⁶ Seen by some as a reaffirmation of the doctrine,¹⁷ *Larson* indicated that, notwithstanding the trend of congressional enactments, the federal courts would hesitate to advance the cause of governmental legal responsibility beyond the parameters of specific legislation.¹⁸

(D.C. Cir. 1977); *United States Steel Corp. v. United States*, 519 F.2d 359, 361 (3d Cir. 1975) (Congress must provide a statutory waiver). See also Jaffe, *supra*, at 2.

13. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793) (Wilson, J., concurring). In *Chisholm*, Justice Wilson stated that "the term *sovereign* has for its correlative, *subject*, [sic] In this sense, the term can receive no application; for it has no object in the Constitution of the *United States*. Under that Constitution there are *citizens*, but no *subjects*." *Id.* (emphasis supplied by the Court). Over 150 years later Justice Frankfurter made this cryptic observation: "As to the States, legal *irresponsibility* was written into the Constitution by the Eleventh Amendment; as to the United States, it is derived by implication." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting) (citations omitted) (emphasis added). See also *id.* at 723 & n.13 (Frankfurter, J., dissenting); Jaffe, *supra* note 12, at 1-3; Note, *supra* note 11, at 1211.

14. Note, *supra* note 11, at 1211. Justice Frankfurter stated that "[i]n varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting).

15. See generally Court of Claims Act, ch. 122, 10 Stat. 612 (1855) (amended version at 28 U.S.C. §§ 1491-1506 (1976)); Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976). Mr. Justice Frankfurter has noted:

In the course of a century or more a steadily expanding conception of public morality regarding "government responsibility" has led to a "generous policy of consent for suits against the government to compensate for the negligence of its agents as well as to secure obedience to its contracts."

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting), quoting *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 396 (1939).

16. 337 U.S. 682 (1949).

17. Jaffe, *supra* note 12, at 29.

18. 337 U.S. at 703-04. The *Larson* majority refused to take judicial action to limit the scope of the doctrine of sovereign immunity as applied to the federal government. *Id.* The Court noted:

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief.

Id. (footnote omitted). Likewise, the Court has held in the past that the doctrine rests on sound principles of public policy: "The principle is fundamental, applies to every sovereign power, and but for the protection it affords, the government would be unable to perform the various duties for which it was created." *Nicholl v. United States*, 74 U.S. (7 Wall.) 125, 127 (1868). "[A]n attempt to overrule or to impair [the government's immunity] on a foundation independently [sic] of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power." *Hill v. United States*, 50 U.S. (9 How.) 385, 389 (1850).

An exemption from court costs and attorney's fees is corollary to the government's immunity from suit.¹⁹ This separate immunity, arising in cases where the government has consented to be sued on the underlying liability, dictates that such consent does not subject the government to costs and attorney's fees.²⁰ Such long established immunity²¹ was expressly asserted by section 2412 of the Judicial Code,²² which codified the common law rule that the sovereign was immune to these items absent an express waiver.²³ In 1966, however, Congress amended that provision,²⁴ reversing the presumption of immunity to costs.²⁵ In amending section 2412 to require an express assertion rather than an express waiver of immunity, the Senate recognized the inconsistency inherent in permitting the United States to escape liability for court costs when its immunity to suit on the underlying liability had been waived.²⁶ Despite this reversal of the presumption as to costs, however, section 2412 as amended maintains the federal government's immunity from an award of attorney's fees.²⁷

Accordingly, a waiver of sovereign immunity will be strictly construed. *See* *United States v. Testan*, 424 U.S. 392 (1976). In *Testan* the Court held that "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* at 399, *quoting* *United States v. King*, 395 U.S. 1, 4 (1969). In an earlier case the Court noted: "Statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27 (1951) (footnote omitted). Still earlier the Court approached this problem by "[c]onstruing the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity." *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

19. *See* *United States v. Chemical Foundation*, 272 U.S. 1, 20 (1926). The *Chemical Foundation* Court stated: "The general rule is that in the absence of a statute directly authorizing it, courts will not give judgments against the United States for costs or expenses . . . Congress alone has the power to waive or qualify that immunity." *Id.*

20. As the D.C. Circuit recently noted, "a general waiver of sovereign immunity should not be construed to extend to attorney's fees unless Congress has clearly indicated that it should." *Fitzgerald v. United States Civil Serv. Comm'n*, 554 F.2d 1186, 1189 (D.C. Cir. 1977), *citing* *United States v. Testan*, 424 U.S. 392 (1976); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

21. *See* note 19 *supra*.

22. Law of June 25, 1948, ch. 646, 62 Stat. 973 (codified at 28 U.S.C. § 2412(a) (1964)) (current version at 28 U.S.C. § 2412 (1976)). The original version provided: "The United States shall be liable for fees and costs only when such liability is expressly provided by Act of Congress." *Id.*

23. *Id.* "[Subsection (a)] follows the well-known common law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law. This is a corollary to the rule that a sovereign cannot be sued without its consent." Reviser's Note, *id.* *See also* notes 19 & 20 *supra*.

24. 28 U.S.C. § 2412 (1976) (as amended 1966).

25. *See id.*

26. S. REP. NO. 1329, 89th Cong., 2nd Sess. 2, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2527, 2528. The report states:

The present law permits a disparity of treatment between private litigants and the United States concerning the allowance of court costs . . . It is fundamental that the law should be uniform in its application. This bill will provide for uniformity of treatment in the award of costs. Apparently the present inequality is related to a governmental advantage derived from the principle favoring immunity of the sovereign from suit. Under modern conditions, there is no reason for this advantage when the law provides for suit against the Government.

Id.

27. *See* notes 24 & 26 and accompanying text *supra*.

While the traditional "American Rule" as to attorney's fees is that each party pays its respective fees regardless of the outcome of the litigation,²⁸ there are both statutory and judicial exceptions to this rule. Many federal statutes include provisions which require or permit the courts to shift the fees of a prevailing private party to a private opponent.²⁹ In some provisions the legislature has exercised its prerogative and included a waiver of the government's immunity to fee awards.³⁰

The judiciary has created exceptions to the American rule as well, but these are barred by sovereign immunity, which only the legislature can waive, wherever applicable.³¹ Pursuant to their equity powers, the courts have shifted fees: 1) where one party acted in bad faith in bringing the suit or in the conduct of litigation;³² or 2) where a fee shift would accomplish the distribution of cost among the class which the litigation benefitted.³³

28. See, e.g., *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Hall v. Cole*, 412 U.S. 1, 4 (1972); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). For an excellent discussion of the no-fee rule, see Comment, *The Discretionary Award of Attorney's Fees By The Federal Courts: Selective Deviation From The No-Fee Rule And The Regrettably Brief Life of the Private Attorney General Doctrine*, 36 OHIO ST. L.J. 588 (1975). See also Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 42 IOWA L. REV. 75 (1963); Stoebe, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).

29. There are over 50 of these provisions in federal legislation. H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 13-14 (1976). Each fee shifting provision falls into one of four categories: 1) mandatory awards to prevailing plaintiffs; 2) mandatory awards to the prevailing party; 3) discretionary awards to prevailing plaintiffs; and 4) discretionary awards to the prevailing party. *Id.* at 5. The fee shifting provisions in civil rights statutes generally fall into the fourth category. *Id.*

30. For example, the fee shifting provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b)(1976), includes this sentence: "The court, in its discretion, may allow . . . a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." *Id.* Title III of the same act provides: "In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person." 42 U.S.C. § 2000b-1 (1976). See also 42 U.S.C. § 2000e-5(k) (1976).

31. See note 19 and accompanying text *supra*.

32. See, e.g., *Hutto v. Finney*, 98 S.Ct. 2565, 2574 (1978); *Vaughn v. Atkinson*, 369 U.S. 527 (1962); *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575 (1946); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Clark v. Board of Educ.*, 369 F.2d 661 (8th Cir. 1966); *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963); *Federal Facilities Realty Trust v. Kulp*, 227 F.2d 657 (7th Cir. 1955); *Schlien v. Smith*, 160 F.2d 22 (D.C. Cir. 1947); *In re Swartz*, 130 F.2d 229 (7th Cir. 1942).

33. *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Mills v. Electric Auto-Lite, Inc.*, 396 U.S. 375 (1970); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967); *United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *Harrison v. Perea*, 168 U.S. 311 (1897); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1881); *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959); *Walsh v. National Sav. & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957); *Cannon v. Parker*, 152 F.2d 706 (5th Cir. 1945), *cert. denied*, 327 U.S. 806 (1946); *Crumb v. Ramish*, 86 F.2d 362 (9th Cir. 1936). See generally Comment, *supra* note 28, at 601; Comment, *The Civil Rights Attorney's Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 207-11 (1977); Note, *Awarding Attorneys' Fees To The "Private Attorney General": Judicial Green Light To Private Litigation In The Public Interest*, 24 HASTINGS L.J. 733, 734-42 (1973).

A third judicial exception to the American rule, the private attorney general theory, also gained short-lived recognition.³⁴ This theory, tailored especially to public interest litigation,³⁵ was approved by the Supreme Court in *Newman v. Piggie Park Enterprises*.³⁶ In *Newman*, plaintiffs had prevailed in a suit under Title II of the Civil Rights Act of 1964,³⁷ but their petition for fees under the Title II provision which grants the courts' discretion to shift fees³⁸ was denied.³⁹ The Supreme Court reversed, holding that under a discretionary fee shifting provision, prevailing plaintiffs should ordinarily receive their reasonable attorney's fees where they vindicated important rights of all citizens which "Congress considered of the highest priority."⁴⁰ Although *Newman* involved the application of a fee shifting statute, the lower courts began to utilize the private attorney general rationale to shift fees in the absence of an applicable fee shifting provision as long as the plaintiffs had acted in accordance with a congressional policy of private enforcement and had succeeded in vindicating important rights.⁴¹

34. This exception came into use after the Supreme Court's decision in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). Its employment, without statutory authority, was foreclosed by the Court's opinion in *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

A private attorney general has been defined as a citizen who, in bringing suit, furthers "a congressional policy envisioning private enforcement of a federal law" and succeeds in vindicating important rights of all citizens. Comment, *supra* note 33, at 205. See also Comment, *Alyeska Pipeline Turns Off the Tap: Can Public Interest Law Survive?*, 71 Nw. U.L. Rev. 239 (1976).

35. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Public interest law by definition involves questions affecting the rights of all citizens. See *id.* at 401-02. A judgment for monetary relief out of which to pay attorney's fees, however, is rarely available. *Id.* at 402. The Court noted that very often in suits of this kind only injunctive relief is available. *Id.* See note 40 *infra*.

36. 390 U.S. 400 (1968).

37. 42 U.S.C. § 2000a to a-6 (1976).

38. 42 U.S.C. § 2000a-3(b) (1976). See note 30 *supra*.

39. *Newman v. Piggie Park Enterprises*, 377 F.2d 433, 437 (4th Cir. 1967), *rev'd*, 390 U.S. 400 (1968).

40. 390 U.S. at 402 (footnote omitted). In particular, the Court noted:

When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . .

Id. (footnote omitted).

41. See, e.g., *Souza v. Travisoni*, 512 F.2d 1137 (1st Cir. 1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974); *Fowler v. Schwarzwald*, 498 F.2d 143 (8th Cir. 1974); *Cornest v. Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). But see *Bradley v. School Bd.*, 472 F.2d 318, 327-31 (1972), *vacated on other grounds*, 416 U.S. 696 (1974).

Despite plaudits by critics of the American rule,⁴² the utilization of the private attorney general theory was short-lived.⁴³ In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁴⁴ the Supreme Court reversed the award of attorney's fees to a private plaintiff against a private defendant, holding that the private attorney general theory has no application in the absence of a statutory provision granting the court the discretion to shift fees.⁴⁵ In response, Congress promulgated the Attorney's Fees Act "to remedy anomalous gaps in our civil rights laws created by the Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, . . . and to achieve consistency in our civil rights laws."⁴⁶ The Attorney's Fees Act grants to the courts the discretion to shift fees in cases brought under civil rights statutes which do not incorporate fee shifting provisions.⁴⁷

Against this background of developing law, the Third Circuit in *Shannon* addressed the issue of the propriety of an award of attorney's fees against the United States in an action under Title VI.⁴⁸ Beginning its analysis with section 2412,⁴⁹ the court noted that a specific fee shifting provision must surmount the mandate of this section to be effective against the United States.⁵⁰ It indicated that the specific provision applicable to the instant case was the Attorney's Fees Act.⁵¹ Comparing the language used in

42. The commentators point out that the American rule places a prohibitive price tag on the enforcement of rights. See notes 33 & 34 *supra*. See also Tunney, *Financing The Cost of Enforcing Legal Rights*, 122 U. PA. L. REV. 632 (1974). Tunney urged the courts not to interpret congressional silence on fee shifting to mean that they could not act independently to shift fees. *Id.* at 633-34.

43. For a discussion of duration of the doctrine's efficacy, see note 34 *supra*.

44. 421 U.S. 240 (1974).

45. *Id.* at 269-71. The Court's holding has been described by one commentator as indicating that since "Congress alone was responsible for determining when private prosecution of specific statutes furthered public policy, . . . fees would not be awarded under the private attorney general theory to a prevailing plaintiff without Congressional authority." Comment, *supra* note 33, at 206.

46. S. REP. NO. 1011, 94th Cong., 2nd Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909.

47. Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1976)). The Attorney's Fees Act provides:

In any action or proceeding to enforce a provision of section 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

48. 577 F.2d at 855-56.

49. *Id.* at 855. See text accompanying note 24 *supra*. The Third Circuit's opinion inaccurately quotes section 2412 as asserting sovereign immunity to costs and fees. 577 F.2d at 855 n.1. This overlooks the 1966 amendment to section 2412. 28 U.S.C. § 2412 (1976). See notes 21 & 25 and accompanying text *supra*. However, since both before and after the 1966 amendment section 2412 asserted the government's immunity to attorney's fees, the error does not affect the court's reasoning. See 28 U.S.C. § 2412 (1976).

50. 577 F.2d at 855.

51. *Id.* at 856. Plaintiffs relied on the legislative history of the Act, Brief for Appellants at 7-9, which states that the Act's purpose is to fill "anomalous gaps in our civil rights laws." S.

other federal statutes to waive immunity to fees with the provisions of the Attorney's Fees Act,⁵² the court found that while both the Act and the noted federal statutes provide for assessment of reasonable attorney's fees as costs, the Attorney's Fees Act omits the clear waiver of sovereign immunity found in the other provisions.⁵³ The court thus held that "the Act does not explicitly waive the sovereign immunity of the United States."⁵⁴

The court also rejected the plaintiff's position that the legislative history would support the finding of an implicit waiver.⁵⁵ Upon consideration of the relevant legislative history, the court noted that "Congress did not contemplate a waiver of sovereign immunity in passing the Act, with the exception of the clause dealing with Internal Revenue suits."⁵⁶

The court's opinion thus accurately reflects the legislative history of the Attorney's Fees Act,⁵⁷ which indicates that the Act was directed at resurrecting the private attorney general exception, not at abrogating sovereign immunity.⁵⁸ In reporting on the Attorney's Fees Act, the House of Representatives Committee on the Judiciary noted that the need for this legislation

REP. NO. 1011, 94th Cong., 2nd Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909.

Plaintiffs argued that the provision was remedial and should be liberally construed. Brief for Appellants at 7-8, 15-18. Further, they contended that since the bill's purpose was to provide the enumerated statutes with a fee shifting provision comparable with those found in other civil rights titles, and since those other titles waive immunity, the court must find that the Act implicitly waived immunity. *Id.* at 8-18.

52. 577 F.2d at 856. See note 30 and accompanying text *supra*.

53. 577 F.2d at 856.

54. *Id.* The court adopted the canon of construction applied by the district court that a waiver of immunity must be explicit and will be strictly construed. *Id.* at 855. See 433 F. Supp. at 251.

55. 577 F.2d at 856.

56. *Id.* The provision relating to Internal Revenue Service suits, known as the Allen Amendment, was added after the bill was reported out of committee. 122 CONG. REC. S17,049-51 (daily ed. Sept. 29, 1976). The court stated:

Congressman Drinan, a House sponsor of the bill, noted that the Allen Amendment was the only provision in the bill which would involve expenditures by the United States.

The legislative history also clarifies an ambiguity in the statute caused by the Allen Amendment. The phrase "by or on behalf of the United States of America" was meant to modify only the phrase "to enforce, or charging a violation of, a provision of the United States Internal Revenue Code," and not the phrase "or Title VI of the Civil Rights Act of 1964."

577 F.2d at 56 n.2 (citations omitted). *Accord*, Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 893 (D. Or. 1977). In *Southeast Legal Defense Group*, plaintiffs prevailed against federal and state defendants in a suit based upon 42 U.S.C. § 1983 (1976), challenging the location of a proposed freeway. 436 F. Supp. at 892. Plaintiffs moved for an award of attorney's fees under the Attorney's Fees Act. *Id.* In determining the propriety of an award of attorney's fees against the federal defendants, the court, like the Third Circuit in *Shannon*, began with section 2412, examined the express waivers in other statutes, looked to the legislative history of the Attorney's Fees Act, and decided that the Act did not waive the immunity of the federal government to fees. *Id.* at 893. The court found that it could award fees against the state defendants. *Id.* at 893-95. *Accord*, Hutto v. Finney, 437 U.S. 678 (1978).

57. For a discussion of the approach taken by courts in determining whether a statute waives immunity, see note 18 and accompanying text *supra*.

58. See notes 59-76 and accompanying text *infra*.

was created by the Supreme Court's decision in *Alyeska*,⁵⁹ while the report of the Senate Judiciary Committee stated that the bill's purpose was "to remedy anomalous gaps . . . created by the United States Supreme Court's recent decision in *Alyeska Pipeline Co. v. Wilderness Society*."⁶⁰ The *Alyeska* decision had held that attorney's fees could not be awarded against a private defendant under the private attorney general rationale absent specific elements,⁶¹ thus precluding the courts from shifting fees under the statutes enumerated in the Attorney's Fees Act while still permitting fee shifting in other civil rights cases. Responding to this anomaly, congressional concern was focused on the court's denunciation of the private attorney general exception,⁶² a theory which even prior to *Alyeska* could not overcome sovereign immunity.⁶³

Moreover, the immunity of the federal government to attorney's fees is not discussed in the committee report of either house.⁶⁴ Both reports,

59. H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 1 (1976). For a discussion of *Alyeska*, see notes 44 & 45 and accompanying text *supra*.

60. S. REP. NO. 1011, 94th Cong., 2nd Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909.

61. 421 U.S. at 269-71. The Court concluded that fee shifting was not permissible absent statutory authorization or the applicability of either the traditional bad faith or common benefit exceptions. *Id.* at 241. For a discussion of these exceptions to the American rule, see notes 29-33 and accompanying text *supra*. The doctrine of sovereign immunity did not go without mention in the Court's opinion. 421 U.S. at 287 (Marshall, J., dissenting). The Secretary of the Interior was also a defendant in the suit, and the lower appellate court had held that as to him an award under the private attorney general theory was barred by sovereign immunity. *Id.* The Court agreed, noting that "§ 2412 on its face, and in light of its legislative history, generally bars such awards, which, if allowable at all, must be expressly provided for by statute, as, for example, under Title II of the Civil Rights Act of 1964." *Id.* at 267-68 (footnotes omitted) (citations omitted).

62. H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 1 (1976); S. REP. NO. 1011, 94th Cong., 2nd Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909. The Senate noted: "This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision." *Id.* at 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 5913.

63. See notes 19, 20 & 31 and accompanying text *supra*. The majority in *Alyeska* recognized the continued immunity of the federal government to fees under a judicially created exception, stating "nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not against the Government." 421 U.S. at 269 (footnote omitted).

64. The only reference in the House report to the federal government as a party appears in a discussion of the propriety of an award in favor of a prevailing defendant. H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 7 (1976). The Committee indicated that they did not feel that an award to a prevailing federal government defendant would be proper. *Id.* The Senate report discussed the possibility of an award against a state or a state official, which the Committee determined would be justified under the fourteenth amendment, but did not address the immunity of federal government defendants. S. REP. NO. 1011, 94th Cong., 2nd Sess. 5, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913. Both reports compare the Attorney's Fees Act to fee shifting provisions which do in fact include a waiver of immunity, but the comparison is made only to indicate that civil rights fees provisions are ordinarily framed as discretionary rather than mandatory, and for that reason the Act places fee shifting within the discretion of the court. H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 5-8 (1976); see also 122 CONG. REP. H12,152 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

however, incorporate the report of the Congressional Budget Office, which indicated "that no additional cost to the government would be incurred as a result of enactment of this bill."⁶⁵ The debates in both houses of Congress are replete with statements by the bill's supporters that, with the exception of the Allen Amendment,⁶⁶ the bill would not result in any expense to the federal government.⁶⁷ Interpreting the Attorney's Fees Act to waive immunity would be inconsistent with these statements since the loss of that immunity would, in the proper case, result in federal liability for another's attorney's fees, thereby creating a new and additional expense for the government.

Furthermore, abrogation of sovereign immunity was specifically rejected in the Senate debates.⁶⁸ During those debates Senator Helms proposed an amendment broadly waiving the federal government's immunity.⁶⁹ The Helms Amendment would have amended section 2412 to allow the recovery of attorney's fees against the United States by civil litigants and criminal defendants.⁷⁰ After a brief discussion which focused on the fact that the present bill would involve little or no expense to the federal government while the Helms Amendment would institute fundamental changes at an indeterminate price,⁷¹ the motion was tabled.⁷²

The Attorney's Fees Act clearly accomplished Congress' express purpose of restoring the private attorney general theory to its pre-*Alyeska* status quo with respect to civil rights litigation.⁷³ When the Supreme Court noted in *Alyeska* that the courts cannot shift fees without express authority,⁷⁴ Congress acted swiftly to fill that "anomalous gap."⁷⁵ The Act, however, does not remedy the inability of the private attorney general theory to surmount

65. S. REP. NO. 1011, 94th Cong., 2nd Sess. 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5914; H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 10 (1976).

66. 122 CONG. REC. S17,049-51 (daily ed. Sept. 29, 1976). For a discussion of the scope and application to date of the Allen Amendment, see Novig, *Attorney's Fee Awards in Tax Litigation*, 64 A.B.A.J. 1601 (1978).

67. Congressman Drinan, a House sponsor of the bill and member of the House Committee, noted during the debate that the addition of the Allen Amendment would involve negligible costs to the United States, 122 CONG. REC. H12,159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan). See, e.g., 122 CONG. REC. H12,154 & H12,159-60 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); *Id.* at S16,259-60 (daily ed. Sept. 21, 1976) (remarks of Sen. Mathias comparing the Allen and Helms Amendments); *Id.* at H12,162-63 (daily ed. Oct. 1, 1976) (remarks of Rep. Kastenmeier).

68. See 122 CONG. REC. S16,260 (daily ed. Sept. 21, 1976) (remarks of Sen. Mathias).

69. *Id.* at S16,257-58 (daily ed. Sept. 21, 1976) (remarks of Sen. Helms).

70. *Id.*

71. *Id.* at S16,259 (remarks of Sen. Helms and Sen. Mathias).

72. *Id.* at S16,261. The court in *Southeast Legal Defense Group v. Adams*, 436 F. Supp. 891 (D. Or. 1977), placed special emphasis on the defeat of the Helms Amendment. *Id.* at 893.

73. S. REP. NO. 1011, 94th Cong., 2nd Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909; H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 1 (1976). Even in this respect Congress' action was conservative, since the private attorney general theory had been applied in numerous types of cases while the Act applies only to the civil rights statutes. See cases cited note 38 *supra*.

74. See note 45 and accompanying text *supra*.

75. See notes 46 & 47 and accompanying text *supra*.

the immunity of the federal government.⁷⁶ If, as the Supreme Court has noted, "one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law,"⁷⁷ then the private enforcement of civil rights envisioned by Congress is still impeded.

It is submitted, that the rule which barred an award of attorney's fees to plaintiffs in *Shannon*, while such fees are recoverable from the federal government under related statutes, is as anomalous as the gap left by *Alyeska*.⁷⁸ Unless Congress responds to this situation with the appropriate legislation, it cannot hope to effectively mobilize private attorneys general for truly self-executing civil rights legislation.⁷⁹ Absent such legislation, *Shannon* stands for the proposition that sovereign immunity continues to bar an award of attorney's fees against the United States under the statutes enumerated in the Attorney's Fees Act.

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76. This infirmity exists only where, as here, the statute does not waive immunity. See notes 19 & 63 *supra*.

77. 421 U.S. at 267.

78. See notes 45-46 & 61 and accompanying text *supra*.

79. Congress is currently considering bills which would award attorney's fees to those who come forward to represent the public interest in federal agency proceedings and "would permit Federal courts to reimburse persons who bring successful lawsuits to challenge agency decisions, but only where a court concludes that the action vindicates important public interests." *Public Participation In Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. 1 (1977) (opening statement of Sen. Kennedy). For a comparison with the description of a private attorney general, see notes 34 & 40 and accompanying text *supra*. See S. 270, 95th Cong., 1st Sess. (1977); H.R. 3361, 95th Cong., 2nd Sess. (1978). The Senate subcommittee has also generated an unnumbered original bill which is very similar to S. 270. However, none of these bills has been reported favorably out of committee.